

SUPERIOR COURT

(Class actions chamber)

CANADA
PROVINCE OF QUÉBEC
DISTRICT OF MONTREAL

N° : 500-06-000720-140

DATE : April 5, 2024

PRESIDING THE

HONOURABLE PIERRE NOLLET, S.C.J.

4037308 CANADA INC.

Plaintiff

c.

NAVISTAR CANADA ULC

NAVISTAR, INC.

NAVISTAR INTERNATIONAL CORPORATION

Defendants

et

FONDS D'AIDE AUX ACTIONS COLLECTIVES

Impleaded Party

JUDGMENT

[1] On May 6, 2021, the Parties agreed to settle this class action (the «**Settlement Agreement**»). This file was one amongst other similar claims in Canada.

[2] The **Class**, for the purposes of the settlement, was defined as all persons, entities, or organizations resident in Quebec who, on or before April 30, 2021, purchased, other than for resale, or leased for more than 30 days, Navistar vehicles equipped with MaxxForce 11-, 13-, or 15-litre engines certified to comply with the 2010 EPA standards,

without the use of selective catalytic reduction technology. The Class Vehicles are 2011-2014 model year vehicles¹.

[3] The Settlement Agreement provides for a collective recovery with individual liquidation of the Class Member's claims under art. 596 C.C.P.

[4] There were 190 approved claims (removing duplicates, rejected, rescinded, and appeals) representing 964 separate VINs and with the following dollar values:²

Cash Option	869 VINs	\$884,477.99
Prove-Up Option	63 VINs	\$467,269.43
TOTAL		\$1,351,747.42
Rebate Option	32 VINs	\$153,379.12

[5] Plaintiff's Counsel provided the following accounting of the settlement amount:

Cash Fund	\$3,002,280.00
Plus: Interest Earned	\$83,554.55
Less: Class Counsel Fees and Expenses	\$731,362.40
Less: Settlement Fees and Expenses	\$190,257.13
Available to the Class for Cash Option & Prove-Up Option	\$2,164,215.02

[6] In the case of the Cash Fund, there is a surplus of **\$812,467.60** (\$2,164,215.02–\$1,351,747.42).

[7] The Settlement Agreement provides for a *pro rata* increase to valid claims from any unsubscribed amount. Already, all the claimants will receive 100% of their valid claims.

[8] The Court must first decide whether it will grant the requested additional fees, as any additional fees awarded will reduce the amount available for distribution over and above the payment of 100 % of the valid claims.

1. CLAIMS ADMINISTRATOR FEES

[9] The total invoices of the Claims Administrator from beginning to end totals \$190,257.13 after applicable taxes.³

[10] This amount exceeds the estimates. Plaintiff explains the increase by unforeseen delays and changes in administrative scope. More specifically, the use of the SAAQ data

¹ The definition of the Class contains several exclusions that are not reproduced here as they are not relevant to the question to be decided.

² Exhibit R-20.

³ Exhibit R-21.

was not contemplated in the first place. The reasons for using the SAAQ data will be explained below.

[11] However, since this data was only available in a fax format it required extensive human data entry.

[12] Also, the appeal and the claim process went on for longer than expected and made the Claims Administrator incur delays and more work.

[13] The difference between the estimated amount and the actual amount is not significant. This work was to the advantage of the Class Members. Accordingly, the additional Claims Administrator fees should be granted.

2. CLASS COUNSEL FEES

[14] The Mandate Agreement between Class Counsel and the Representative Plaintiff provides for a fee of the higher of a 3.5 times multiplier of the time spent or 30% of the value of the benefits, plus disbursement, plus applicable taxes.

[15] In the Settlement Agreement, Class Counsel agreed to reduce its fee to 25%, including disbursements (\$3,265.39), plus applicable taxes.

[16] In the judgment approving the settlement⁴, Class Counsel was awarded a fee of 20%, plus disbursements, plus applicable taxes. This part of the decision was not appealed and is *res judicata*.

[17] The application for additional fees is based on new facts;

[18] An appeal by a proposed Intervenor was both not provided for under the Settlement Agreement⁵, nor contemplated by Justice Gagnon, J.S.C. in his decision dated January 20, 2022.

[19] In the rest of Canada, plaintiff's counsels asked for and were awarded a fee of 30%, plus disbursements and applicable taxes⁶.

[20] In his decision about Class Counsel's fees, Justice Gagnon chose to award a fee at the low end of the spectrum. One of the main reasons for his decision is that the Quebec class action was an obvious copycat of the U.S. class action.

[21] This reasoning does not apply for the additional work carried out in this case. While the application for intervention by three other Canadian law firms was known at the time

⁴ Exhibit R-6.

⁵ Exhibit R-1.

⁶ Exhibit R-18.

of Justice Gagnon's award, the appeal process that ensued was not entirely foreseeable and important additional work was required.

[22] In the present case Class Counsel alleges to have performed the following tasks after its reduced fee had been approved:

- 22.1. Reviewed the proposed Intervenor's leave materials, produced a responsive Argument Plan, and argued the Motion for Permission to Appeal (unsuccessfully);
- 22.2. Reviewed all of the proposed Intervenors' Factum Materials, Navistar's Factum Materials, produced its own Factum, and argued the appeal on the merits (successfully);
- 22.3. Convinced the Settlement Administrator and Defence Counsel to extend the claim deadline during the appeal process which led to a higher claim rate;
- 22.4. Came up with the idea to use the SAAQ data to approve deficient claims, such as where certain information was missing from the Claim Form, for example, if they failed to specify the exact dates of when they owned or leased the Class Vehicle(s). The Settlement Administrator was going to send deficiency letters out, which could have significantly impacted the claim rate, as it is likely that many people would not have answered or been in possession of the necessary information;
- 22.5. 469 Class Members entered their contact information on Class Counsel's website. Class Counsel's online presence, built over the years, enabled a take-up rate; which otherwise would have been significantly lower;

[23] The hours and disbursement spent since after Class Counsel's fees were approved are as follows:

Lawyer	Time Spent	Hourly Rate	Amount
Jeff Orenstein Called to the QC Bar 2002 Called to the ON Bar 2011	172	\$825	\$ 141,900.00
Andrea Grass Called to the NY Bar 2009 Called to the QC Bar 2012 Called to the ON Bar 2013 Called to the CAL Bar 2015	168	\$600	\$ 100,800.00
Disbursements			\$ 5,280.50
		Total	\$ 247,980.50 (plus applicable taxes)

[24] Class Counsel is requesting that the additional amount to complete the 25% provided for in the Settlement Agreement be awarded. It was originally provided for as compensation. Co Class Member has ever objected to it. If one adds the disbursements, and applicable taxes the amount comes to \$158,120.10 (\$790,600.50–\$632,480.40) + \$5,280.50 = \$163,400.60 plus GST/QST.

[25] Le Fonds d'aide aux actions collectives, which is an impleaded party, does not contest the additional fees and disbursements of Class Counsel.

[26] The additional work incurred is real and should be compensated to the extent the request is not to the detriment of the Class Members. In the present case, the claim period benefited from a significant extension and nevertheless an unclaimed balance still exists.

[27] Even if the additional fees are reducing the unsubscribed balance, valid claims will already be compensated over and above 100% of their value. In effect, an unsubscribed balance will still exist despite the increased fees.

[28] Class Counsel's claim for additional fees and disbursements will be allowed. The overall amount claimed is still reasonable, within the parameters of the Settlement Agreement and does not relate to the portion awarded by Justice Gagnon.

3. LEVY FOR THE FONDS D'AIDE AUX ACTIONS COLLECTIVES

[29] With respect to the levy due to the FAAC under the *Regulation respecting the percentage withheld by the Fonds d'aide aux actions collectives*, chapter F-3.2.0.1.1, r. 2, it is governed by article 1(1), i.e., established based on the remaining balance.

[30] Class Counsel initially asked for such a balance to be established based on any uncashed cheques.

[31] The FAAC objected to this formulation. It was the FAAC's position that the entire balance in the account (after distribution) should constitute the balance for the purposes of the levy.

[32] Class Counsel ultimately agreed to remove the portion of its conclusion limiting the balance to stale dated cheques, so that the levy is calculated on the balance as provided for in the Settlement Agreement.

POUR CES MOTIFS, LE TRIBUNAL :

[33] ACCORDE la Demande;	GRANTS the Application;
[34] APPROUVE le paiement à RicePoint Administration Inc. de 190 257,13 \$;	APPROVES the payment to Rice Point Administration Inc. of \$ 190,227.13 including applicable taxes;
[35] APPROUVE le paiement aux Procureurs du Groupe de leurs honoraires extrajudiciaires et des débours de 163 400,60 \$ plus les taxes applicables;	APPROVES the payment to Class Counsel of its extrajudicial fees and disbursements of \$163,400.60 plus applicable taxes;
[36] ORDONNE que le prélèvement pour le <i>Fonds d'aide aux actions collectives</i> soit calculé conformément à l'article 1(1) du <i>Règlement sur le pourcentage prélevé par le Fonds d'aide aux actions collectives</i> ;	ORDERS that the levy for the <i>Fonds d'aide aux actions collectives</i> be calculated in accordance with article 1(1) of the <i>Regulation respecting the percentage withheld by the Fonds d'aide aux actions collectives</i> .
[37] SANS FRAIS DE JUSTICE. [39]	[38] WITHOUT LEGAL COSTS.

 PIERRE NOLLET, S.C.J.

Me Jeffrey Orenstein
 Me Andrea Grass
 CONSUMER LAW GROUP INC.
 Attorneys to Plaintiff

Me Jean Lortie
 Me Samuel Lepage
 MCCARTHY TÉTRAULT LLP
 Attorneys to Defendants

Me Nathalie Guilbert
 Attorneys to Fonds d'aide aux actions collectives

Date d'audience : February 27, 2024