CANADA

PROVINCE OF QUÉBEC
DISTRICT OF MONTREAL

No.: 500-06-000720-140

(Class Action)
SUPERIOR COURT

4037308 CANADA INC.,

Petitioner

-vs-

NAVISTAR CANADA INC.
and
NAVISTAR, INC.
and
NAVISTAR INTERNATIONAL CORPORATION

Respondents

and

N&C TRANSPORTATION LTD. a corporation with its head office at 17488 101 Avenue, Surrey, British Columbia
and
FARRIS LLP, a limited liability partnership with its head office at 2500 – 700 West Georgia Street, Vancouver, British Columbia
and
FOREMAN & COMPANY PROFESSIONAL CORPORATION, a corporation with its head office at 4 Covent Market Place, London ON N6A 1E2
and
ROCHON GENOVA LLP, a limited liability partnership with its head office at 121 Richmond Street West, Suite 900, Toronto, Ontario

Intervenors

APPLICATION FOR LEAVE TO INTERVENE AND FOR A TEMPORARY STAY OF THE CLASS ACTION
(Arts. 18, 49, 185 and 577 C.C.P. & Art. 3137 C.C.Q.)

TO THE HONOURABLE MR. JUSTICE PIERRE-C. GAGNON, OF THE SUPERIOR COURT, SITTING IN AND FOR THE DISTRICT OF MONTREAL, N&C TRANSPORTATION LTD., FARRIS LLP, FOREMAN & COMPANY PROFESSIONAL CORPORATION AND ROCHON AND GENOVA LLP RESPECTFULLY SUBMIT THE FOLLOWING:

I. INTRODUCTION

1. The intervenors, N&C Transportation Ltd. ("**N&C**"), as well as the law firms Farris LLP, Foreman & Company Professional Corporation and Rochon Genova LLP (collectively the "**Intervenors**"), seek an order from this Honourable Court:

   a. To temporarily stay the herein proceedings pending the outcome of the B.C. Supreme Court's decision on multi-jurisdictional opt-out certification;

   b. In the alternative, to temporarily stay the herein proceedings for a duration of three (3) months and, during that time period, direct that a multi-jurisdictional case management conference be held with Justice Ronald A. Skolrood, of the B.C. Supreme Court, to coordinate the settlement approval process in Québec with the multi-jurisdictional proceedings certified in B.C., the whole in the interest of Québec class members;

   c. To reserve the rights of the Intervenors to seek an extension of the opt-out deadline of October 1, 2021 and the revision of the notices delivered to Québec class members, pending the outcome of the B.C. Supreme Court's decision on multi-jurisdictional opt-out certification process or the outcome of the multi-jurisdictional case management conference sought;

   d. To declare that the relief sought is not a material modification of the terms of the Proposed Québec Settlement (as this term is defined below) and that the Navistar Defendants, Plaintiff and its counsel are not entitled to invoke the relief sought as grounds for withdrawing from the Proposed Québec Settlement.

2. In sum, the Intervenors seek to protect the interests of Québec class members in the context of the approval of a settlement that bears all the hallmarks of a reverse auction (*i.e. "enchère inversée*") and imposes upon Québec class members terms significantly less favourable than those consented by the Navistar Defendants in other jurisdictions, the whole as more fully described below.

II. THE FACTS

A. THE INTERVENORS

3. N&C is the appointed national class representatives in the proceedings instituted against the Navistar Defendants in B.C. Supreme Court Action No. VLC-S-S-144960 (the "**B.C. Action**"), as it appears from the Notice of Application dated 31

August 2021 filed in the B.C. Supreme Court (the **"B.C. Application**"), filed in support hereof as **Exhibit R-1**.

4. At the time the certification of the B.C. Action was argued and granted on a contested basis in 2016, the B.C. class actions regime provided that all class members who were not residents of B.C. were subject to an "*opt in*" regime.

5. As a result, the class definition of the B.C. Action included the Québec class members in the present action, but the latter could only participate in the B.C. Action on an "*opt in*" basis.

6. Relying on recent amendments to the B.C. class actions regime, N&C is presently seeking to have the certified national B.C. class declared a multi-jurisdictional *opt-out* class that would include all Canadian class members, including those in Québec, as it appears from the B.C. Application (Exhibit R-1).

7. The law firms Farris LLP, Foreman & Company Professional Corporation and Rochon Genova LLP are members of a national consortium bound by an agreement to cooperate in the administration of Canadian class proceedings against the Navistar Defendants, including the B.C. Action.

8. Mtre. Jeff Orenstein and Consumer Law Group ("**CLG**") were also members of the consortium from May 2019 to March 2021, when CLG purported to withdraw from said consortium, as more fully described below.

B. THE B.C. ACTION

9. The B.C. Action was originally filed on June 24, 2014 and is the first proposed class action regarding the Navistar EGR Trucks filed in Canada and, to the best of the Intervenors' knowledge, the first such class action filed in North America.

10. On November 16, 2016, the B.C. Supreme Court issued Reasons for Judgement granting the plaintiffs' application for certification of the B.C. Action as a class proceeding under the BC *Class Proceedings Act,* R.S.B.C 1996, c.50 (the "**BC *CPA***") and appointing N&C as the Representative Plaintiff, as it appears from the said judgment of the B.C. Supreme Court (the "**Initial B.C. Certification Judgment**"), filed in support hereof as **Exhibit R-2**.

11. The class definition the B.C. Supreme Court certified is as follows (underlining added):

> Class definition
>
> All persons resident in Canada that purchased heavy duty Class 8 tractor trailer trucks using advanced exhaust gas recirculation technology ("EGR") that purported to meet the emission requirements introduced by the United States Environmental Protection Agency (the "EPA") applicable as of

> 2010 (the "EPA 2010 Requirements") and did not use EGR in combination with selective catalytic reduction technology ("SCR") which trucks were designed, tested manufactured, and marketed by the defendants, Navistar International Corporation, Navistar Inc. and Navistar Canada Inc. (the "Navistar EGR Trucks") from January 2009 to the date of certification (the "Class Period").
>
> The Navistar EGR Trucks are equipped with "MaxxForce 11", "Maxxforce 13" or "Maxxforce 15" engines and include the following Navistar truck brands: "Paystar", "Workstar", "Transtar", "9900i", "Lonestar", and "ProStar".
>
> Sub-class Definition
>
> All persons resident in Canada that purchased and/or operated Navistar EGR Trucks sold by the Defendant, Harbour International Trucks Ltd., during the Class Period.

12. The parties to the B.C. Action, as well as counsel for the representative plaintiffs in a parallel Ontario proceeding involving substantially the same subject matter - *Stayura Well Services Ltd. et al. v. Navistar Canada Inc., et al.* (Ontario Superior Court of Justice; Court File No. CV17579285CP00) (the "**Stayura Proceeding**"), then engaged in extended without prejudice negotiations regarding various procedural matters for the purpose of developing a national litigation plan by consent.

13. Class counsel in the B.C. Action agreed with the Defendants in that action that the deadline for commencing an appeal from the Court's certification decision would be tolled while these without prejudice negotiations were ongoing.

14. On September 9, 2017, rather than engage further in the above-noted without prejudice discussions, the Defendants filed a Notice of Change of Lawyer in the BC Action and took steps to appeal the BC Supreme Court's certification decision.

15. On November 2, 2017, the Defendants filed a Notice of Appeal in the B.C. Court of Appeal from the B.C. Supreme Court's certification decision.

16. The Defendants' certification appeal, together with the Plaintiffs' cross-appeal of the decision not to certain certify common issues, was heard on February 9, 2018 in the Court of Appeal.

17. On August 1, 2018, the B.C. Court of Appeal issued its decision dismissing the Defendants' appeal of the certification decision and granting the Plaintiffs' cross-appeal, in part, as it appears from the judgment of the B.C. Court of Appeal, filed in support hereof as **Exhibit R-3**.

18. Defendants' counsel in the B.C. Action subsequently filed an application for leave to appeal to the Supreme Court of Canada in respect of the BC Court of Appeal's certification decision.

19. On March 28, 2019, the Supreme Court of Canada dismissed the application for leave to appeal, as it appears from the judgment of the Supreme Court of Canada, filed in support hereof as **Exhibit R-4**.

20. Publication of notice of certification to members of the class was held in abeyance pending the outcome of the Court of Appeal's certification decision and the application for leave to appeal to the Supreme Court of Canada, as contemplated by the Initial B.C. Certification Judgment (Exhibit R-2).

21. On June 26, 2018, British Columbia Order in Council No. 326 was approved and ordered that, effective October 1, 2018, the *Class Proceedings Amendment Act, 2018*, S.B.C. 2018, c. 16 (the "**CPA Amendment Act**"), is brought into force, as it appears from the CPA Amendment Act filed in support hereof as **Exhibit R-5**.

22. N&C is seeking amendments to the certification order in the B.C. Action and orders regarding notice approval to address outstanding certification issues that were contemplated by the Initial B.C. Certification Order, as it appears from the B.C. Application (Exhibit R-1).

23. The B.C. Application (Exhibit R-1), which seeks to have the B.C. Action converted into an opt-out multi-jurisdictional class proceeding pursuant to the provisions of the CPA Amendment Act was heard in part on October 13, 2021 during a hearing presided by Justice Skolrood. (The relief sought in the B.C. Application as relief 1(b) and 2-7 were left to a further hearing at a date yet to be set by the Court.

24. All of the proceedings concern a central contention that the Defendants manufactured and sold trucks containing engines that utilized a defective emissions management system and related technology.

25. N&C argued before the B.C. Court that the multi-jurisdictional class action sought serves the interests of all class members in all of the Canadian class proceedings and the efficient administration of justice to ensure that a thorough and binding adjudication at trial of that central contention on a fully developed record.

26. Justice Skolrood has taken the matter of the relief sought at 1(a) of the B.C. Application (Exhibit R-1) under advisement and is expected to deliver oral reasons on October 19, 2021.

C. OTHER MULTI-JURISDICTIONAL CLASS ACTIONS PROCEEDINGS INVOLVING NAVISTAR EGR TRUCKS

27. In addition to the B.C. Action, multi-jurisdictional class proceedings were commenced elsewhere in Canada against the Defendants, other than Harbour

International Trucks Ltd. (the "**Navistar Defendants**"), involving the Navistar EGR Trucks.

i. Ontario

(1) The Stayura Proceeding, as defined above. Statement of Claim originally filed September 8, 2014 and subsequently amended on September 14, 2017. The plaintiffs' Motion Record for class certification was filed September 19, 2017. The certification hearing was not scheduled once the B.C. Action had been certified and a national consortium was reached. Class counsel is a consortium of Foreman & Company Professional Law Corporation and Rochon Geneva LLP who are working collaboratively with Farris LLP to prosecute this matter on a national basis.

(2) *R&A Trans Corp. v. Navistar Canada Inc. et al.* (Ontario Superior Court of Justice; Court File No. 15-63387) (the "**R&A Proceeding**"). Statement of Claim filed February 17, 2015. Class counsel in this proceeding is CLG. Counsel for N&C is unaware of any steps having occurred in this proceeding since the filing of the Statement of Claim.

(together, the "**Ontario Proceedings**")

ii. Manitoba

(1) *Brown v. Navistar Canada Inc. and Navistar International Corporation* (Manitoba Queen's Bench; File No. CI 14-01-90962) (the "**Manitoba Proceeding**"). Statement of Claim filed August 15, 2014. A certification schedule leading to a proposed certification hearing in the last week of January 2019 was initially set pursuant to a Class Proceedings Certification Memorandum (No. 1) of Lanchbery J., dated November 17, 2017. Subsequent correspondence from the case management judge to counsel in this proceeding, dated September 5, 2018, indicates that the case was removed from the active hearing list at the request of plaintiff's counsel Merchant Law Group ("**MLG**"). The correspondence from Lanchbery J. further states that, "In the event that this matter is to be brought forward, that consent of both parties shall be required in written form. <u>This matter has been moving at a glacial pace,</u> and given that there has been a suggestion that the result of an appeal in BC may indeed be contingent to this action, <u>I am concerned about that judicial resources are being wasted in Manitoba</u>" (underlining added). On July 30, 2019, almost a year after the Court expressed concerns about the glacial pace of the matter, MLG advised that they had filed an expert report and served it on the defendants in this matter. Subsequent correspondence on October 7, 2019,

indicates that MLG was then attempting to bring the matter forward for a case management conference to ask the Court to set a pre-certification schedule. Counsel for N&C is unaware of any other steps having occurred in relation to this proceeding.

iii. Alberta

(1) *Andes Transport Inc. v. Navistar Canada Inc., et al.* (Alberta Court of Queen's Bench; File No. 1403 16425) (the "**Alberta Proceeding**"). Statement of Claim filed November 10, 2014. Class counsel is CLG. The parties purported to enter into a settlement of the Alberta Proceeding on a national basis, excluding B.C. and Québec residents, on September 15, 2021, as further explained below.

28. In the herein proceedings, *4037308 Canada Inc. v. Navistar Canada Inc., et al.* (Québec Superior Court; File No. 500-06-000720-140) (the "**Québec Action**") the original Motion to Authorize the Bringing of a Class Action was filed on November 28, 2014. This was approximately five (5) months after the filing of the B.C. Action.

29. As set out below, this action was authorized on consent for settlement purposes pursuant to an Order of this Court on June 22, 2021.

D. CANADIAN CONSORTIUM COUNSEL AND CLG

30. Since 2018, Harrison Pensa LLP and Rochon Genova LLP (together "**Ontario Counsel**") and counsel for the plaintiffs in the B.C. Action ("**B.C. Counsel**") have worked together to coordinate the Stayura Proceeding and the B.C. Action. In 2020, Foreman and Company replaced Harrison Pensa LLP as co-counsel to Rochon Genova LLP.

31. In 2019, Mtre. Jeff Orenstein, on behalf of CLG, agreed to work jointly with B.C. Counsel and Ontario Counsel to coordinate the B.C. Action, the Ontario Action and three (3) actions commenced by the Consumer Law Group, including the Québec Action.

32. On May 24, 2019, Mtre. Orenstein, on behalf of the Consumer Law Group, executed a written "*Fee Sharing and Co-Counsel Agreement*" with B.C. Counsel and Ontario Counsel, as it appears from a copy of said agreement (the "**Consortium Agreement**"), filed in support hereof as **Exhibit R-6**.

33. Among other things, the Consortium Agreement (Exhibit R-6) provided as follows:

a. "*BC Counsel, Ontario Counsel, and CLG have entered into this Addendum Agreement <u>for the purposes of making the Québec Action, the Alberta Action, and the R&A Action part of the coordinated National Class Action</u> contemplated by the Fee Sharing and Co-Counsel Agreement and including*

CLG and the CLG Retainer Agreements in an agreement regarding the division of counsel fees"; and

b. "*BC Counsel, Ontario Counsel, and CLG will confer and work together with respect to any settlement discussions*."

[Emphasis added]

34. Notably, Mtre. Orenstein and CLG entered into the Co-Counsel Agreement after the B.C. Action was certified as a national class action and after the CPA Amendment Act was brought into force. The "*National Class Action*" contemplated in the Consortium Agreement was an *opt-out* multi-jurisdictional class proceeding in B.C., which would include in its scope the Québec class members.

35. On May 28, 2019, the Defendants entered into a national settlement related to the Navistar MaxxForce Engines in parallel class proceedings in the United States (the "**U.S. Settlement Agreement**"), as it appears from the U.S. Settlement Agreement filed herewith as **Exhibit R-7**.

36. B.C. Counsel, Ontario Counsel and the Navistar Defendants entered into a Non-Disclosure Agreement, effective May 1, 2019 (the "NDA") for the purposes of facilitating without prejudice discussions with counsel for Defendants. The NDA was drafted to allow Canadian class counsel to discuss confidential information received with class counsel in the U.S.

37. On May 8, 2019, Mr. Rochon of the Ontario Counsel sent a copy of the NDA to Mr. Orenstein by email.

38. On May 15, 2019, a without prejudice settlement meeting was convened among counsel for the Defendants in this proceeding, U.S. Counsel for Navistar, B.C. Counsel and Ontario Counsel.

39. During May and June 2019, B.C. Counsel and Ontario Counsel had discussions and email correspondence with lead counsel for the class plaintiffs in the U.S. class action regarding the U.S. Settlement.

40. In January 2020, the United States District Court for the Northern District of Illinois Eastern Division approved the U.S. Settlement.

41. The existence of the prior discussions and settlement discussions is admitted by the Defendants, as it appears from Defendants' Written Submissions filed in the record of the B.C. Supreme Court in the context of N&C's B.C. Application (Exhibit R-1) (the "**Defendants' B.C. Submissions**"), filed in support hereof as **Exhibit R-8**.

42. On March 12, 2021, N&C filed and served (including upon the Navistar Defendants) a Notice of Intention to Proceed in the B.C. Action.

43. On March 16, 2021, Jeff Orenstein sent an email to Joel Rochon, Jonathan Foreman and Robert Anderson, Q.C., in which he stated: "*As no co-counsel agreement was ever finalized, signed and entered into between us, the present email is to inform you that my intention is to proceed on my own with the Québec case …*"

44. On 5 April 2021, Mr. Joel Rochon, founding partner of the Intervenor Rochon Genova LLP, sent an email to Mtre. Orenstein advising him that the Intervenors would seek "*leave to amend the* [B.C.] *certification order, to state that the proceeding is certified as a multi-jurisdictional class proceeding, and re-defining the class as a national class, on an opt-out basis*," as it appears from the exchange of emails filed in support hereof as **Exhibit R-9**. [Emphasis added]

45. Shortly after this exchange, Mtre. Orenstein and CLG decided not to continue as part of the coordinated group of Canadian plaintiffs' counsel.

46. On 6 July of 2021, N&C communicated to CLG and counsel for the Navistar Defendants their Notice of Application for an order stating that the B.C. Action is certified as a multi-jurisdictional opt-out class proceeding (the "**Notice of Application**"), as it appears from the Notice of Application and the exchange between counsel filed in support hereof as **Exhibit R-10**.

47. On July 6, 2021, a request was made to the Court for a hearing date. Given the limited availabilities of counsel for the Navistar Defendants, the earliest date that could be secured was October 13, 2021.

48. On August 31, 2021, after securing a hearing date, N&C filed and served its Notice of Application seeking a National Certification Order in the BC Action (Exhibit R-1). The B.C. Application was served on both the Defendants and CLG.

E. CLG AND NAVISTAR'S ATTEMPT TO HAVE THIS COURT AND THE ALBERTA COURT QUICKLY APPROVE REGIONAL SETTLEMENTS

49. In May 2021, CLG and the Navistar Defendants, without notice to either the B.C. Counsel or the Ontario Counsel, entered into a settlement of the Québec Action (the "**Proposed Québec Settlement**"), as it appears from the Proposed Québec Settlement made available on CLG's website, filed in support hereof as **Exhibit R-11**.

50. As explained in more detail below, the Proposed Québec Settlement attempts to impose upon the Québec members less favourable terms than those consented by the Navistar Defendants as part of the U.S. Settlement Agreement (Exhibit R-7).

51. Contrary to the terms of the Consortium Agreement (Exhibit R-6) noted above, CLG did not confer or communicate at all with B.C. Counsel and Ontario Counsel in respect of the Proposed Québec Settlement or CLG's settlement negotiations with the Defendants.

52. Subsequently in June 2021, without notice to the Intervenors in either the Ontario Action or the B.C. Action, although they are interested parties, CLG and the Defendants brought an application in this Court to authorize the Québec Action for settlement and approve notices to Québec residents.

53. Following a hearing on June 18, 2021, this court granted the order sought on June 28, 2021 and set October 1, 2021 as the date for Québec Class Members to object to the settlement or opt out, and scheduled the settlement approval hearing for October 20, 2021.

54. Based on the Intervenors' review of the audio recording of the June 18, 2021 hearing in this Court, CLG did not bring to the Court's attention:

    a. The Intervenors' stated intention to seek leave from the B.C. Court to amend the B.C. Certification Judgment to declare that the B.C. Action is a multi-jurisdictional class proceeding and re-defining the class as a national class on an *opt-out* basis;

    b. Mtre. Orenstein's and CLG's prior involvement with B.C. Counsel and Ontario Counsel and the existence of the Consortium Agreement.

    as it appears from the affidavit of Mohnaam Kaur Shergill dated 4 October 2021, filed in support hereof as **Exhibit R-12**.

55. The short form notice distributed pursuant to this Court's June 28, 2021 judgment (the "**Short Form Notice**") contains no reference whatsoever to the B.C. Action, as it appears form the Short Form Notice made available on CLG's website filed in support hereof as **Exhibit R-13**.

56. The long form notice distributed pursuant to this Court's June 28, 2021 judgment (the "**Long Form Notice**") fails to state clearly that Québec members have a right to opt in the B.C. Action and make no reference to the B.C. Application or to the possibility that the Québec class members may be included in the B.C. Action on an *"opt-out*" basis. The Intervenors file in support hereof the Long Form Notice made available on CLG's website, as **Exhibit R-14**.

57. The Intervenors were entirely unaware of Plaintiff's application to authorize the Québec Action for settlement purposes and approve the distribution of notice before it was heard; they were entirely unaware of the June 18, 2021 hearing and of the June 28, 2021 judgment before it was issued.

58. The Intervenors became aware of the June 28, 2021 judgment by this Court only after it was rendered, in July 2021.

59. The Intervenors asked CLG and the Navistar Defendants to provide copies of the motion materials and other documents filed in in the record of the Québec Superior Court in support of the application to authorize the Québec Action and to approve the Proposed Québec Settlement, as it appears from the letter from Farris LLP to

GLC and counsel for the Navistar Defendants dated August 16, 2021, filed in support hereof as **Exhibit R-15**.

60. CLG refused to comply fully with this request, as it appears from an email from Mtre. Orenstein dated September 1, 2021, filed in support hereof as **Exhibit R-16**.

61. Counsel for the Navistar Defendants did not answer the Intervenors' request for communication of the motion materials and exhibits.

62. On September 15, 2021, after having been formally served with the application for a National Certification Order in the B.C. Action, and without notice to either the B.C. Counsel or the Ontario Counsel, the Defendants and CLG entered into a settlement of the Alberta Action (the "**Proposed Alberta Settlement**"), filed in support hereof as **Exhibit R-17**.

63. The Proposed Alberta Settlement contemplates settlement on behalf of all Canadian residents, other than those in B.C. or Québec.

64. The steps the Defendants have taken to settle this action in Québec and the Alberta Action with CLG bear all the hallmarks of a reverse auction, as it shall be more amply explained below.

65. Having engaged in prior without prejudice discussions with B.C. Counsel and Ontario Counsel, who were responsible for the prosecution of the only certified Canadian proceeding, without reaching settlement, it appears that the Defendants sought to settle substantially all Canadian claims by entering into regional settlement agreements on their preferred terms.

66. To do so, they have agreed to settlement with CLG, a regional class counsel that had executed the Consortium Agreement, and who had undertaken limited active steps in any proceeding (and effectively no steps beyond filing a duplicative claim in the Alberta Action).

III. THE INTERVENORS' LEGAL INTEREST

60. N&C is the appointed representative for the national class in the context of the certified B.C. Action. The national class includes the Québec class members subject to the Québec Proposed Settlement, who have a right to opt in the B.C. Action.

61. As a result, N&C is the representative for the Québec class members who could decide to opt in the B.C. Action, if they were adequately informed of such rights.

62. This alone is sufficient to grant N&C legal interest to intervene in the Québec Proceeding to protect the rights and interests of Québec class members in the context of the settlement approval process. *A fortiori*, the purpose of the stay sought is to vindicate, among others, the Québec class members' rights to be adequately informed of the B.C. Action and the impact of the Proposed Québec Settlement on their rights as members of a national class.

63. Furthermore, as it appears from the B.C. Application (Exhibit R-1), N&C is seeking to become the representative plaintiff for a national class, including Québec class members, on an "*opt out*" basis.

64. For the same reasons as those mentioned above, this grants N&C sufficient legal interest to seek the appropriate relief form this Court to ensure that the settlement approval process is adequately coordinated with the B.C. Action and the rights of the Québec class members are protected.

65. Farris LLP is counsel of record for N&C in the context of the B.C. Action. Foreman & Company Professional Corporation and Rochon Genova LLP are co-counsel of record for the plaintiff in the Stayura Proceeding. The classes in the B.C. Action and the Stayura Proceeding include the Québec class members.

66. As a result, the Intervenor law firms have the right *and the duty* to bring to this Court's attention the following concerns and to seek the appropriate remedy to protect the rights of the class members they represent, including the Québec class members.

IV. THE QUÉBEC CLASS MEMBERS' INTERESTS ARE NOT ADEQUATELY PROTECTED BY THE SETTLEMENT APPROVAL PROCESS

67. For the following reasons, the interests of the Québec class members are not adequately protected by the Québec approval process:

A. The Québec class members have not been adequately informed of the impact of the Proposed Québec Settlement on their rights in the context of the B.C. Action;

B. The U.S. Settlement was used as a proxy for the Québec Proposed Settlement; and

C. The Proposed Québec Settlement bears all the hallmarks of a reverse auction ("*enchère inversée*") meant to undermine the national opt-out certification process pending before the B.C. Supreme Court.

the whole as it will be more fully described below.

A. THE QUÉBEC CLASS MEMBERS HAVE NOT BEEN ADEQUATELY INFORMED

68. Québec class members are included in the B.C. national class and have – at the very least – a right to opt in the B.C. Action.

69. Pending the outcome of Justice Skolrood's decision, Québec class members could be included in a certified national multi-jurisdictional class action litigated before the B.C. Supreme Court on an "*opt-out*" basis.

70. Unless they opt out of the Proposed Québec Settlement, Québec class members will lose their right to participate in the B.C. Action, whether on an "*opt in*" or "*opt out*" basis.

71. Given the foregoing developments, the notices to Québec class members in the context of the present settlement approval process should not have been distributed until the outcome of the national opt-out certification process in the B.C. Action, which includes Québec class members in the scope of the proposed national opt-out class.

72. The current opt-out deadline of October 1, 2021 (for the purpose of settlement approval) does not allow Québec class members sufficient time to make an informed decision on the exercise of their rights to opt out of the Proposed Québec Settlement.

73. The Short Form Notice distributed in Québec makes no mention whatsoever of the B.C. Action, nor of the Stayura Proceeding or of any other alternative class proceedings in which the Québec residents could choose to participate.

74. In particular, the Short Form Notice and the CLG website, under the heading "*What are my options?*", do not identify the right of Québec class members to opt out of the Québec Action (and the current Proposed Québec Settlement) and join the B.C. Action which is already certified on a national basis, as it appears from the Short Form Notice (Exhibit R-13).

75. Furthermore, the Long Form Notice (Exhibit R-14) does not adequately describe the rights that Québec residents have to participate in the B.C. Action instead of the Québec Action, if they choose to opt out of the Proposed Québec Settlement.

76. The Long Form Notice does not identify or mention the B.C. Action (or other Canadian proceeding) until the sixth page. It states that the B.C. Action is certified but does not disclose that the class definition in B.C. includes all persons resident in Canada and that Québec residents are entitled to be class members in that proceeding.

77. The notice contains confusing information on this point as it states that, "*If you exclude yourself from this Class Action, you may be able to join one of the other actions <u>if you meet any Class definitions certified in those Classes [sic]</u>*." [Emphasis added]

78. In the circumstances, Québec class members received inadequate and confusing information that likely hampered their ability to make an informed decision on the exercise of their rights to opt out of the settlement proposed by CLG and the Navistar Defendants in Québec.

B. THE U.S. SETTLEMENT IS AN INADEQUATE PROXY FOR THE PROPOSED QUÉBEC SETTLEMENT

79. The Proposed Québec Settlement is modeled on the U.S. Settlement, although for substantially less real dollars on a proportionate basis. This is prejudicial for the interests of the Québec class members for the following reasons.

80. First, the litigation risk that U.S. plaintiffs faced was significantly higher than the litigation risk faced by Plaintiff and CLG in the Québec proceedings or by plaintiffs in the other Canadian class proceedings.

81. The U.S. class faced a number of legal obstacles that jeopardized certification as a result of the legal idiosyncrasies governing compensation for hidden defects in U.S. jurisdictions.

82. Conversely, the B.C. Action has been certified, the certification upheld and in fact expanded by the Court of Appeal and leave to the Supreme Court of Canada refused.

83. Moreover, provincial jurisdictions across Canada have substantially consistent and uniform law regarding product liability underpinning the claims, without any significant statutory regimes that make such claims more difficult to pursue (as exist in the U.S.).

84. Québec law is particularly favourable to the victims of hidden defects, given the presumption of knowledge of the hidden defect that weighs against the professional seller or manufacturer; the "*very narrow*" range of defences available to the Navistar Defendants in Québec; and the Québec class members' statutory right to claim damages for loss of profits. (See in particular *ABB Inc.* v. *Domtar*, [2007] 3 S.C.R. 461, at para. 72; Articles 1590, 1611 and 1728 C.C.Q)

85. By contrast, certain U.S. jurisdictions bar the recovery of pure economic loss, which significantly reduces the legal foundations and economic scope of the claims against the Navistar Defendants in the U.S. and – hence – the chances of success at certification.

86. The legal advantages that the Québec class members enjoy in Québec are best illustrated by the recent decision of the Tennessee Supreme Court in *Milan Supply Chain Solutions Inc.* v. *Navistar Inc.* (the "**Milan Case**"), filed in support hereof as **Exhibit R-18**.

87. The individual plaintiff in the Milan Case proved all the elements of liability for hidden defects (per the legal test under Québec law) but was stymied in its claim by the restriction against the recovery of pure economic loss.

88. Simply put, the Plaintiff in the Québec Action is in a far better position than were the plaintiffs who settled in the U.S. and yet, the Proposed Québec Settlement contains terms that are less favourable than those of the U.S. Settlement (as explained below).

89. Second, the uptake and implementation of the U.S. Settlement, that is now into its second year, demonstrates the inherent shortcomings of that settlement.

90. Counsel's research suggests that the uptake and implementation of the U.S. Settlement has been fraught with delays and ongoing litigation. In summary, there were: 41 opt outs (which included an average fleet size of 54 trucks each); 5 objectors; 3 rounds of 'fairness' solicitation; 3 extensions of the claims deadline (2 opposed); 2 motions to opt out post-settlement approval; 1 motion to stay the enforcement of the settlement approval judgment; 1 motion to argue the claims process as unfair; and 1 motion to enforce the settlement against a direct litigant's claim. Over 2/3 of class members' claims were rejected at first instance and the settlement claims have not yet been determined in over 2 years since the US Settlement was entered.

91. The Intervenors file in support hereof the Affidavit of Esther Kubryn, and the supporting exhibits, as **Exhibit R-19**.

C. THE PROPOSED QUÉBEC SETTLEMENT IS A REVERSE AUCTION THAT UNDERMINES THE NATIONAL CLASS PROCEEDINGS

92. For the following reasons, it is apparent that the Proposed Québec Settlement is the fruit of a process that led the Navistar Defendants to conclude regional settlements with plaintiffs of inactive or duplicative actions to impose preferential terms (for the Navistar Defendants) on the Québec class members.

93. First, from a processual perspective, Mtre. Orenstein previously agreed to act as co-counsel, on behalf of CLG, with B.C. Counsel and Ontario Counsel. CLG entered into the Proposed Québec Settlement in breach of the Consortium Agreement.

94. Further, Mtre. Orenstein and CLG have not taken any material steps to advance the litigation in Québec other than filing the authorization motion and, years later, entering into a settlement.

95. Mtre. Orenstein's authorization application relied on an expert report of Dr. Jim Cowart that was filed in the B.C. Action. The Intervenor Farris LLP engaged and paid Mr. Cowart for his services on behalf of the national class. Mtre. Orenstein or the Plaintiff has never had any communications with him. They did not have Mr. Cowart's consent, nor the consent of the B.C. Counsel to include the Cowart expert report in the authorization application.

96. As such, Mtre. Orenstein and CLG are not in a position to critically evaluate the merits of Proposed Québec Settlement on the terms that the Defendants are seeking.

97. Second, the Proposed Québec Settlement is worse for the Québec class members than the U.S. Settlement.

98. Given the reduced amounts proposed to be paid by Navistar, the number of trucks owned by class members that reside in Québec and the very likely high take up rate, the money that each class member will receive is likely to be lower than the already unacceptable amount class members will receive from the U.S. Settlement.

99. The terms of the Proposed Québec Settlement are demonstrably inferior for the Québec class members than those of the U.S. Settlement for U.S. class members.

100. The "*Cash Fund*" in the Québec settlement totals $2,614,486 CAD and there is also a Rebate Fund in the amount of $145,360 CAD. The Cash Fund is intended to cover both "*Cash Option*" payments of $2,500 CAD per Class Vehicle or "*Prove-Up*" claims of up to $15,000 CAD per vehicle, the whole as it appears from the Proposed Québec Settlement, filed in the Court record and made available on the CLG website.

101. The U.S. Settlement offered the same amounts; however, they were in US dollars.

102. Accordingly, Québec class members electing the Cash Option will receive approximately $550 less per truck than U.S. class members based on current exchange rates.

103. Québec class members that successfully prove up a $15,000 costs claim would receive $3,500 less than U.S. class members.

104. The Cash and Rebate Funds also seem to be smaller proportionately than the same funds in the US Settlement and the Proposed Québec Settlement contains no waterfall mechanism between funds as is present in the U.S. Settlement (Exhibit R-7).

105. Alternative settlement terms in Canada are necessary and appropriate to avoid the on-going disputes and difficulties with the settlement administration and further direct litigation in the U.S.

106. Based on the U.S. experience, the take-up rate could be substantial in respect of any settlement and that cash and rebate funds in the amount of the Proposed Québec Settlement (or even the US Settlement) will be quickly oversubscribed and dissipated. Substantial opt-outs and on-going direct litigation is a practical certainty without alternative settlement terms.

107. Finally, the Proposed Québec Settlement was entered into with Plaintiff and CLG *after* discussions to settle the *national* litigation between the Navistar Defendants broke down, as it appears from the Defendants' B.C. Submissions (Exhibit R-8).

108. The Navistar Defendants approached Plaintiff and CLG in Québec and in Alberta to conclude regional settlements, undermining the national litigation strategy that the Intervenors have furthered for more than seven (7) years.

109. The Intervenors' collective judgment – informed by the research, analysis and experience gathered in more than seven (7) years of actively litigating the national class action – is that the Proposed Québec Settlement does not serve the interests of Québec class members.

110. The Navistar Defendants were at all times aware that this was and remains the view of the Intervenors and have chosen CLG and the Plaintiff as a settlement partner to achieve their preferred terms.

111. Given the foregoing and the reality of the results of the U.S. Settlement, a settlement based on either the U.S. Settlement or the Proposed Québec Settlement is not in the interest of the Québec class members.

112. At the very least, the Québec class members should be adequately informed of the consequences of the Proposed Québec Settlement.

V. THE REMEDY SOUGHT

A. TEMPORARY STAY AND *LIS PENDENS*

113. It is well established that this Court has inherent jurisdiction to stay any action that is brought before it provided that such a stay is consistent with the principles of proportionality and judicial economy, or when there is a risk of contradictory judgments arising out of related matters before different courts.

114. Article 3137 C.C.Q. also provides that this Court may stay its ruling on an action brought before it if there is a situation of 'international' *lis pendens.*

115. In other words, "*if another action, between the same parties, based on the same facts and having the same subject is pending before a foreign authority, provided that the latter action can result in a decision which may be recognized in Québec*."

116. The Intervenors satisfy the legal test for obtaining a stay on the basis and *a fortiori* are entitled to the temporary stay they seek, for the following reasons:

a. **Identity of parties**: The parties to the Québec Action are also parties to the B.C. Action. It is not necessary for the parties to be physically identical as between the Québec Action and the B.C. Action. What is required is juridical identity by representation.

Juridical identity by representation is present. The class definition in the B.C. Action includes the class members in the Québec Action. In contrast, the Québec Action's proposed provincial class only includes Québec residents.

b. **Identify of cause of action:** Both the Québec Action and the B.C. Action are based on the same key allegations of fact and assert overlapping causes of action. Both actions allege the following:

i. that Navistar had knowledge of certain defects caused by EGR;

ii. that Navistar EGR trucks are dangerous to operate;

iii. that Navistar made negligent and/or fraudulent misrepresentations;

iv. that Navistar breached the terms of the express warranties;

v. that Navistar's conduct was negligent; and

vi. that the Plaintiffs and class members have suffered loss and damages as a result.

The Defendants refute these allegations in both the Québec and B.C. Actions.

c. Same object: Both the Québec Action and the B.C. Action seek to recover damages on behalf of class members allegedly suffered as a result of the Defendants' alleged impugned conduct.

d. Anteriority of the B.C. Action: As mentioned, above the B.C. Action was filed five (5) months before the Québec Action.

117. This said, and notwithstanding the foregoing grounds for seeking a stay under Article 3137 C.C.Q., the Intervenors seek only a temporary stay of the Québec Action pending the outcome of the B.C. Supreme Court's decision on multi-jurisdictional certification.

118. If the B.C. Action is converted into an opt-out multijurisdictional class proceeding including Québec, then Québec class members will be included automatically and will benefit from the experience and work product of B.C. Counsel and Ontario Counsel in conducting the litigation.

119. Even if the B.C. Action is not converted into an opt-out class proceeding as regards Québec, the Québec class members will nonetheless benefit from a right to opt in the B.C. class proceedings.

120. The stay sought will allow the Québec and B.C. courts to cooperate and coordinate the notice and settlement approval process in the best interest of the Québec class members and of their rights to be adequately informed of the consequences of the Proposed Québec Settlement.

121. The stay sought is also consistent with the "*spirit of mutual comity*" between courts of different Canadian provinces: *Canada Post Corp. v. Lepine,* [2009] 1 SCR 549, at para. 57.

122. The Intervenors thus respectfully submits that this Court should exercise its discretion to stay the Québec Action. Doing so aligns with the interests of justice and the interests of the putative class members.

B. THE INTEREST OF THE QUÉBEC CLASS MEMBERS

123. The temporary stay of the Québec Action pending the outcome of the B.C. Supreme Court's decision on multi-jurisdictional certification, or in the alternative for a duration of three (3) months, serves the rights and interests of Québec residents, in accordance with article 577 C.C.P.

124. First, as mentioned, the stay and the multi-jurisdictional case management conference sought will allow the Québec and B.C. courts to coordinate the certification of the national opt-out class action in B.C. with the settlement approval process in Québec.

125. Second, the remedy sought will prevent the approval of a settlement that would bind Québec class members and compromise their rights to participate in the national class (whether on an opt-in or opt-out basis), in the absence of the adequate information to make an enlightened choice on the exercise of their rights to opt out.

126. The remedy sought preserves an opportunity to extend the opt-out deadline and revise the notices to Québec class members in coordination with the B.C. Supreme Court's decision on the national opt-out certification and thus adequately inform the Québec class members of their rights.

127. Third, the remedy sought also preserves the opportunity of the Proposed Québec Settlement for those Québec class members who will decide to accept its terms, after being adequately informed of the consequence of such a choice.

128. Given the shortcomings of the U.S. Settlement and the Proposed Québec Settlement detailed above, a quick settlement approval according to the proposed terms does not serve the interests of the Québec class members.

129. It is not in the interests of Québec class members to enter into a settlement agreement that is likely to have little, if any, return in the next few years and on terms that are less favourable to those consented by the Defendants in the U.S. Settlement.

130. The U.S. Settlement experience demonstrates that Québec class members will likely need to wait years before any distribution occurs. Indeed, in the two years since the US Settlement, no money has been distributed to US class members.

131. Mtre. Orenstein and CLG are not best positioned to advocate on behalf of the rights and interests of Québec class members. Counsel for the B.C. Action and the Ontario Action have engaged in substantial hours of work, engaged strong expert witnesses, engaged with class members and counsel in the U.S. Action. In contrast, Mtre. Orenstein used the expert report prepared by Dr. Cowart for the B.C. Action without notice or permission. Mtre. Orenstein and CLG entered into the Proposed Québec Settlement and proceeded to obtain a notice distribution judgment from this Court without notice to the Intervenors and in breach of CLG's obligations under the Consortium Agreement.

132. In the circumstances, it is all the more important that Québec class members receive adequate information on the consequences of the Proposed Québec Settlement.

C. THE DECLARATORY CONCLUSION

133. The Intervenors also seek a declaration that the remedy sought – *i.e.* the temporary stay and the multi-jurisdictional case management conference – does not constitute a material modification of the Proposed Québec Settlement that would justify a withdrawal by the Navistar Defendants from said settlement.

134. The temporary stay sought for a limited duration (*i.e.* three (3) months) does not cause any prejudice to the Navistar Defendants.

135. Conversely, the stay sought will allow for an opportunity to adequately inform the Québec class members of the consequences of the Proposed Québec Settlement.

136. The Québec class members have not been adequately informed precisely because of the dealings between the Navistar Defendants, Plaintiff and CLG, including the absence of notice to the Intervenors of the application to authorize the Québec action for settlement purposes.

137. Had the Navistar Defendants and CLG given timely notice of their intentions to submit the Proposed Québec Settlement for approval, the Intervenors could have raised their concerns with this Court much earlier, during the June 18, 2021 hearing.

138. The Navistar Defendants' and CLG's failure to fully communicate the motion materials to the Intervenors has further hampered the Intervenors' ability to fully understand and react to the settlement approval process in Québec.

139. For these reasons, the Navistar Defendants and CLG are foreclosed by their duty of good faith to oppose a judicial declaration that the remedy sought does not constitute a material modification of the Proposed which aims to preserve both the Proposed Québec Settlement and the Québec class members' right to be receive adequate information.

[*The conclusions sought are on the next page*]

FOR THESE REASONS, MAY IT PLEASE THE COURT TO:

[1] **GRANT** the present *Application for Leave to Intervene and for a Temporary Stay of the Class Action*;

[2] **SHORTEN** any time period for the notification, presentation or production of the present *Application for Leave to Intervene and for a Temporary Stay of the Class Action*;

[3] **AUTHORIZE** the Intervenors N&C Transportation Limited, Farris LLP, Foreman & Company Professional Corporation and Rochon Genova LLP to intervene in the present class action;

[4] **STAY** the present class action until such time as the Supreme Court of British Columbia will have rendered judgment on the *Notice of Application* brought by the Intervenor N&C Transportation Limited in the file bearing docket number VLC-S-S-144960 of the Vancouver Registry;

[5] *Subsidiarily*, **STAY** the present class action for a duration of three (3) months;

[6] *De bene esse*, **DIRECT** that a multi-jurisdictional case management conference be held with Justice Ronald A. Skolrood, of the Supreme Court of British Columbia at such time and upon such conditions as shall be determined by the Superior Court of Québec and the Supreme Court of British Columbia;

[7] **RESERVE** the Intervenors' rights to return before this Court and request the revision of the judgment issued by this Court on 22 June 2021, the revision and redistribution of the notices to the Québec Class Members and the extension of the opt-out deadline of October 1, 2021;

[8] **DECLARE** that the temporary stay granted pursuant to the judgment to be rendered does not constitute a material modification to the terms of the Proposed Québec Settlement and that the parties to the Proposed Québec Settlement may not invoke such temporary stay as a ground to withdraw from the settlement.

THE WHOLE without costs, save in case of contestation.

[*The signature is on next page*]

MONTRÉAL, 15 October 2021

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LIST OF EXHIBITS

Exhibit R-1	Notice of Application dated August 31, 2021 filed in the Supreme Court of British Columbia by N&C Transportation Limited
Exhibit R-2	Judgment by the Honorable Ronald A. Skolrood, of the Supreme Court of British Columbia, dated November 16, 2016
Exhibit R-3	Judgment of the British Columbia Court of Appeal dated August 1, 2018
Exhibit R-4	Judgment by the Supreme Court of Canada dated March 28, 2019
Exhibit R-5	The *Class Proceedings Amendment Act 2018*, S.B.C. 2018, c. 16
Exhibit R-6	Addendum to Fee Sharing and Co-Counsel Agreement
Exhibit R-7	Stipulation and Agreement of Settlement entered into on May 28, 2018 in the United States Court Northern District of Illinois Eastern Division
Exhibit R-8	Navistar Defendants' Written Submissions in the B.C. Supreme Court, dated October 13, 2021
Exhibit R-9	Exchange of emails between Mr. Joel Rochon, of Rochon Genova LLP, and Mtre. Jeff Orenstein, of Consumer Law Group, dated April 5, 2021
Exhibit R-10	Notice of Application filed by N&C Transportation Limited in the British Columbia Court of Appeal dated 6 July 2021 and exchanges between counsel
Exhibit R-11	Settlement Agreement, Transaction and Release dated May 6, 2021
Exhibit R-12	Affidavit of Mohnaam Kaur Shergill dated 4 October 2021
Exhibit R-13	Short Form Notice to Class Members
Exhibit R-14	Long Form Notice to Class Members
Exhibit R-15	Letter from Mr. Robert S. Anderson to Mtre. Jeff Orenstein and Ms. Jill Yates dated August 16, 2021

Exhibit R-16 Email exchange between Mtre. Jeff Orenstein, Robert S. Anderson and Jill Yates dated September 1, 2021

Exhibit R-17 Settlement Agreement, Transaction and Release dated September 15, 2021

Exhibit R-18 *Milan Supply Chains Solutions Inc. F/K/A Milan Express Inc.* v. *Navistar Inc. et al.*, Supreme Court of Tennessee, November 4, 2020, No. C-14-285

Exhibit R-19 Affidavit of Esther Kubryn, with supporting exhibits

MONTRÉAL, 15 October 2021

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AFFIDAVIT OF ROBERT S. ANDERSON

I, Robert S. Anderson, Q.C., partner at Farris LLP, practicing my profession at 2500 – 700 West Georgia Street, Vancouver, British Columbia, do hereby solemnly declare as follows:

1. I am a partner and duly authorized representative of Farris LLP and one of the counsel of record for N&C Transportation Limited in the B.C. Action;

2. I have read the *Application for leave to intervene and for a temporary stay of the class action* (the "**Application**");

3. To my knowledge, based on my personal knowledge and my review of the materials that were filed by the Plaintiff N&C Transportation Limited in the B.C. Application before Justice Skolrood, all the facts alleged in the Application are true.

AND I HAVE SIGNED IN VANCOUVER, B.C.

Robert S. Anderson

Solemnly affirmed before me by technological means
This 15 October 2021

Louise Dufresne #100 453
Commissioner of Oaths

NOTICE OF PRESENTATION

TAKE NOTICE that the *Application for leave to intervene and for a temporary stay of the class action* shall be presented in the Civil Practice Division of the Superior Court, in room **25.02** of the Longueuil Courthouse situated at 25 Lafayette, Longueuil, on **20 October 2021**, at **9:30 a.m.,** or as counsel may be heard.

Attendance will be in person (i.e. face-to-face) or via the following link corresponding to room 25.02 of the Annex of the Longueuil Courthouse:

Nous rejoindre sur votre ordinateur ou votre appareil mobile
Cliquez ici pour participer à la réunion
Rejoindre à l'aide d'un appareil de vidéoconférence
teams@teams.justice.gouv.qc.ca
ID de la vidéoconférence: 111 415 735 7
Autres instructions relatives à la numérotation VTC
Ou composer le numéro (audio seulement)
+1 581-319-2194,,926250080# Canada, Quebec
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MONTRÉAL, 15 October 2021

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No.: 500-06-000720-140

SUPERIOR COURT (CLASS ACTION)
DISTRICT OF MONTREAL
PROVINCE OF QUÉBEC

4037308 CANADA INC.

Petitioner

-vs-

NAVISTAR CANADA INC. ET ALS

Respondents

and

N&C TRANSPORTATION INC.
and **FARIS LLP**
and **FOREMAN & COMPANY PROFESSIONAL CORPORATION**
and **ROCHON GENOVA LLP**

Intervenors

APPLICATION FOR LEAVE TO INTERVENE AND FOR A TEMPORARY STAY OF THE CLASS ACTION
(ARTS. 18, 49, 185 AND 577 C.C.P. & ART. 3137 C.C.Q.)

ORIGINAL

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