CANADA

COURT OF APPEAL OF QUÉBEC

PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL

C.A.: 500-09-
C.S.M.: 500-06-000720-140

N&C TRANSPORTATION LTD., legal person 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 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

APPELLANTS – Intervenors

c

4037308 CANADA INC., a legal person with its head office at 90 Maisonneuve Street, in the town of Dollard-des-Ormeaux, district of Montréal, Province of Québec, H9B 1K4

RESPONDENT – Plaintiff

-and-

NAVISTAR CANADA INC., a legal person with an establishment at 5500 North Service Road, Burlington, Ontario L7L 6W6
-and-
NAVISTAR, INC., a legal person with its head office at 2601, Navistar DR, Lisle, IL, 60532, U.S.A.
-and-
NAVISTAR INTERNATIONAL CORPORATION, a legal person with its head office at 2601, Navistar DR, Lisle, IL, 60532, U.S.A.

RESPONDENTS – Defendants

NOTICE OF APPEAL
(Article 352 *C.C.P.*)
Appellants
Dated 25 February 2022

1. Appellants are challenging a judgment of the Superior Court of Québec, District of Montréal, issued on 20 January 2022 by the Honourable Pierre-C. Gagnon, J.S.C. (the "**Judgment**" and the "**Judge**"), granting an application to approve a class action settlement presented by Respondent 40373038 Canada Inc. and dismissing Appellants' application to intervene, their request for a temporary stay and their objections to the proposed settlement.[1]

2. The date of the notice of judgment is 3 February 2022. The duration of the first-instance hearing was one full day. The Judgment is attached herewith as Appendix 1. The value in dispute is undetermined. The value of the settlement approved by the Judge is approximately $3 million.

3. The Judge erred in the Judgment in the three following respects:

Ground 1: The Judge erred in law by mischaracterizing the remedy and the legal grounds of the intervention sought; he also misstated the legal test applicable to aggressive or conservatory interventions at settlement approval. In so doing, the Judge held implicitly that out-of-province representatives of a proposed national class that includes Québec residents cannot – as a matter of principle – intervene in Québec to protect the rights of absent Québec class members.

Ground 2: The Judge erred in law by denying the Appellants' request to complete their evidence and arguments on an issue the Judge raised during the hearing and considered determinative, *i.e.* the timing of the intervention. This constitutes a denial of justice, *a fortiori* since the impugned delay was principally owed to the inaccessibility of the Court file, which was held in the Judge's office.

[1] See the Judgment, Annex 1.

Ground 3: The Judge erred in law by approving a *reverse auction* settlement concluded in breach of class counsel's duties of transparency and cooperation, which is contrary to public order. The Judge truncated the legal test governing settlement approval and ignored his own findings regarding the irregularities of the settlement at issue that suggest collusive dealings.

CONTEXT

4. On June 24, 2014, the Applicant N&C Transportation Inc. instituted class action certification proceedings against the Respondent entities ("**Navistar**") in British Columbia (the "**B.C. Action**"). The B.C. Action alleges hidden defects affecting the engines of the trucks manufactured and sold by Navistar.[2] The Intervenor Farris LLP is counsel to N&C in the B.C. Action ("**B.C. Counsel**").

5. During the second half of 2014, Consumer Law Group ("**CLG**") filed in Québec the present class proceedings on behalf of the Respondent-Plaintiff and Québec members. CLG also instituted class proceedings against Navistar in Alberta. Class actions were also initiated in Ontario by plaintiffs represented by the Appellants Rochon Genova LLP and by Harrison Pensa LLP, replaced by Foreman & Company in 2020. (collectively the "**Ontario Counsel**"; the "**Ontario Action**").[3]

6. On November 16, 2016, Justice Skolrood of the Supreme Court of British Columbia certified the B.C. Action as an opt-in proceeding on behalf of a national class, including the Québec class members.[4]

7. In May 2019, B.C. Counsel and Ontario Counsel, began settlement discussions with counsel for Navistar on a national, pan-Canadian basis, and entered into a non-disclosure agreement with Navistar to facilitate those discussions.[5]

8. On May 24, 2019, CLG entered into an agreement with B.C. Counsel and Ontario Counsel whereby CLG undertook to coordinate the Québec action and the Alberta

---

[2] *Application for Leave to Intervene and for a Temporary Stay of the Class Action* (the "**Intervention**"), Annex 3 to the *De Bene Esse Application for Leave to Appeal* (the "**Application**"), at pp. 2 to 5.
[3] Intervention, Annex 3 to the Application, at paras. 27 to 29; Judgment, Annex 1, at pp. 3, 6 and 7.
[4] Exhibit R-2 to the Intervention, Annex 4 of the Application.
[5] Intervention, Annex 3 of the Application, at paras. 38 and 39.

actions with the B.C. and Ontario Actions and to cooperate with the Appellants with respect to any settlement discussions (the "**Consortium Agreement**").[6]

9. Settlement discussions on a pan-Canadian basis continued between Navistar, B.C. Counsel and Ontario Counsel in May and June 2019.[7]

10. On May 28, 2019, Navistar entered into a settlement agreement disposing of parallel class proceedings in the United States (the "**U.S. Settlement**").[8]

11. In late 2019, discussions on a pan-Canadian basis between B.C. Counsel, Ontario Counsel and Navistar broke down. Unbeknownst to the Appellants, Navistar then initiated private discussions with CLG aimed at settling ***only*** the class proceedings initiated by CLG, including this Québec case.[9]

12. On March 12, 2021, N&C filed and served (including upon Navistar) a notice of intention to proceed with the B.C. Action,[10] to request the B.C. Court to allow the national class, including the Québec members, to operate on an opt-out rather than opt-in basis, the whole under changes enacted to the B.C. class actions regime in 2018, which enabled national opt-out class proceedings.[11]

13. By March 2021, the activity in the context of the Québec matter was "*very limited.*"[12]

14. On 8 May 2021, unbeknownst to the Appellants, Navistar, CLG and Respondent 4037308 Canada Inc. entered into the Québec settlement agreement at issue.[13] In June 2021, also unbeknownst to the Appellants, CLG applied in Québec in this case for leave to distribute notices of settlement to the Québec members.[14]

15. During the hearing held on that application on June 18, 2021, CLG failed to disclose to the Court the intended opt-out national certification proceedings in B.C. CLG

---

[6] Intervention, Annex 3 of the Application, para. 32; Exhibit R-6 to Intervention, Annex 4 of the Application.
[7] Intervention, Annex 3 of the Application, at para. 39.
[8] Judgment, Annex 1, at para. 32; see also Exhibit R-7 to the Intervention, Annex 4 of the Application.
[9] Affidavit of Edelina Macaspac, 18 October 2021, Annex 5 of the Application, at para. 16a).
[10] Intervention, Annex 3 of the Application, at para. 42.
[11] Exhibit R-5 to Intervention, Annex 4 to Application; Intervention, Annex 3 to Application, para. 21 *et seq.*
[12] Judgment, Annex 1, at para. 127.
[13] Intervention, Annex 3 of the Application, at para. 49 and following; Judgment, Annex 1, at para. 103.
[14] Intervention, Annex 3 of the Application at para. 52.

also failed to disclose its dealings with B.C. and Ontario Counsel, and incorrectly told the Court that "*nothing has materialized further*" to opt-in certification in B.C.[15]

16. On 10 August 2021, CLG distributed the notices in Québec.[16] The short form notices contained no mention of the B.C. Action. [17] The long form notices contained no mention of the Appellants' proceedings to transform the B.C. Action into an opt-out national class action, which CLG had received, and incorrectly suggested that Québec class members may not be included in the national class.[18] The notices also failed to mention the dollar-value cap that applies to the settlement.

17. The Appellants learned of the notice distribution order in July after it was issued. Between July and October 2021, they sought to obtain the court record from CLG and counsel for Navistar, who refused to cooperate fully.[19] They also sought to obtain the Court record at the Montreal Courthouse but were told the file was withdrawn from public access and held in isolation at the Judge's office.[20]

18. In October 2021, the Appellants contacted the undersigned counsel, who notified the Judge, CLG and counsel for Navistar of the intervention sought by letter dated October 13, 2021. On October 15, 2021, counsel notified an Application for leave to intervene (the "**Intervention**").

19. During the hearing on the Application, the Judge raised the time that lapsed between July and October 13, 2021. But he refused to allow Appellants to testify or address the Court on this issue[21] and refused to allow counsel to explain the reasons for the delay, namely the inaccessibility of the Court file and out-of-province practice rules and customs prevent or restrict attorney-judge contact.[22]

---

[15] Intervention, Annex 3 at paras. 53 and 54; Exhibit R-12 to the Application, Annex 4 to the Application.
[16] See *Application for Settlement Approval*, Annex 11 to the Application, at para. 29.
[17] Intervention, Annex 3, at para. 55; see also Exhibit R-13 to the Application, Annex 4 to the Application.
[18] Application, Annex 3, at para. 56; see also Exhibit R-14 in support of the Application, Annex 4.
[19] Application, Annex 3, at paras. 59 and 60; see also Exhibit R-16 in support of the Application, Annex 4.
[20] Exhibit R-16 in support of Intervention, Annex 4: "*We have sought access to such materials from the Court but have been advised that Justice Gagnon retained the court file in his office on an indefinite basis.*"
[21] Recording of the Hearing, Annex 7 of the Application, at Part 1 of 4, at 59 minutes 0 seconds.
[22] Recording of the Hearing, Annex 7 of the Application, at Part 2 of 4, at 0 minutes, 45 minutes.

GROUND 1: The Judge erred in law by mischaracterizing the intervention sought as a "*carriage motion*", by failing to recognize a mixed and by misstating the legal test governing such interventions in a class action context.

20. It is well established by this Court and by the Supreme Court of Canada that an error of legal characterization is an error law which commands little deference.[23]

21. The Appellants submitted a mixed aggressive and conservatory intervention – conservatory since the Appellants sought to assist and support the absent class members who received inadequate information;[24] aggressive since the Appellants sought conclusions *against* the parties, including a temporary stay.[25] Yet, the Judge erred in law by mischaracterizing the Intervention as a "*carriage motion.*"[26] No carriage motion was sought or desired by Appellants.

22. This distorting lens tainted the rest of the Judge's analysis and led to a cascade of legal errors, including the failure to recognize the existence of mixed interventions and misstating the legal criteria governing same.

23. The main conclusion sought pursuant to the Intervention was to "*authorize Intervenors to intervene in the present class action,*"[27] under Article 185 C.C.P. which governs aggressive and conservatory interventions. The Judge erred in law by mischaracterizing the procedural vehicle of the intervention based on the position that the Appellants asserted on the merits of the matter.

24. The Judge also mischaracterized the conclusions sought by Appellants on the merits. The Judge erred in law by ruling that Appellants sought the "*precedence*" of the B.C. Action over the Québec matter. He failed to consider that Appellants sought instead: i) the filing of new evidence suggesting collusion, lack of diligence and inadequate notification to members; and ii) a ***temporary*** stay to allow the adequate notification of Québec members, in this highly unusual matter.

---

[23] *Fortin* v. *Mazda Inc.*, 2016 QCCA 31, at para. 87; *ABB Inc.* v. *Domtar*, [2007] 3 S.C.R. 461, at para. 37.
[24] Intervention, Annex 3 of the Application, at paras. 60 to 66 and 67 to 112.
[25] Intervention, Annex 3 of the Application, at p. 21.
[26] Judgment, Annex 1, at paras. 54 and following.
[27] Intervention, Annex 3 of the Application, at p. 21.

25. The Judge disregarded entirely the Québec class members' right and interest to receive adequate information on the rights subject to the proposed settlement. The Judge adopted instead an incorrectly broad reading of Article 577 C.C.P., which could prevent ***any*** intervention in Québec by out-of-province national class representatives, even where such an intervention furthers the "*protection of the rights and interests of the Québec residents.*"[28]

26. The distorting lens of the "*carriage motion*" also led the Judge to err in holding that the C.C.P. "*does not recognize the type of intervention attempted here.*"[29]. This ruling is contrary to appellate case law that established the existence of mixed conservatory and aggressive intervention in the context of individual actions.[30] The Judgment is also contrary to recent appellate case-law that extended the scope of aggressive or conservatory interventions to class actions, in favour of third-party non-members of the class. In such contexts, the legal test must be adapted in view of the Judge's role as a guardian of the absent class members' rights and the obligation of full and frank disclosure by the settlement parties.[31]

27. The Judge mischaracterized the intervention sought as an *amicus curiae* intervention and failed to adapt the legal test to the class action context.[32] The Judge disregarded entirely the inadequacy of the information provided to Québec class members regarding the B.C. Action, as well as CLG's defaults on its duties of transparency to the Court and cooperation towards Appellants.

28. The Judge's errors were determinative. Assessed within the correct legal framework, the Judge's findings of fact – "*CLG failed to keep the case management judges in Québec abreast of what was happening (or not happening) in those parallel cases*"[33] – would have led the Court to grant the intervention and the balance of the remedies sought by the Appellants. Instead, the impugned errors led the Judge to disregard the Appellants' standing as representative and legal

---

[28] Article 577 C.C.P.
[29] Judgment, Annex 1, at paras. 65 and following.
[30] See *inter alia Cobenco Construction Inc.* c. *Construction Désqurdy*, 1991 CanLII 8174 (QC C.A.).
[31] *Abishira* v. *Johnston*, 2019 QCCA 657 (CanLII), at paras. 29 and 56.
[32] Judgment, Annex 1, at paras. 54 and following.
[33] Judgment, Annex 1, at para. 130.

counsel to a proposed national class, including Québec members, which justifies *in se* their interest to intervene in this matter.[34] The Judge's errors also led him to disregard the Appellants' interest as third parties to challenge the approval of a settlement that is contrary to the public order of direction (see Ground 3, below).

GROUND 2: The Judge erred in law by denying the Appellants' request to complete their evidence and arguments on an issue the Judge raised during the hearing and considered determinative, *i.e.* the timing of intervention.

29. The Judge failed in his duty to allow the Appellants to complete the evidence and arguments on a point he raised during the hearing and upon which he dismissed the Application,[35] *i.e.* the time lapsed between July 2021 and October 13, 2021, when counsel first contacted the Judge to notify the intervention. This constitutes a denial of justice, which justifies appellate intervention.

30. During the Appellants' argument, the Judge refused counsel's request to present witness testimony on the very question he had raised regarding the timing of the intervention, stating: "*He* [Mr. Foreman] *is not authorized to address the Court ... you tell me what the proof I have now tells me about what took place or what should have taken place.*" Then, immediately prior to Navistar's argument, he again refused to allow counsel to complete the answer to the Court's question regarding the absence of contact with the Court before October 2021. In particular, he refused to hear evidence or argument regarding practice rules or customs outside Québec which prevented or restricted direct communication with the Judge: "*Are you testifying under oath, Mtre. Dobrota? (...) I feel duty-bound to dismiss that observation. We have practice rules in Québec and they apply in Québec. We don't apply B.C. practice rules in Québec.*"[36]

31. The denial of justice is particularly flagrant given that the delay in intervening, for which the Judge reproached the Appellants, is primarily owed to the inaccessibility

---

[34] Yves Lauzon, *Traité Pratique de l'action collective*, Cowansville, Yvon Blais, 2021 (EYB2011TPA39), at § 6.3.1.1.1.; *Warner* v. *Google*, 020 BCSC 1108, at para. 106.
[35] Article 268 C.C.P.; *Protection de la jeunesse -115308*, 2011 QCCA 2147, at para. 54; *Centre de santé et de services sociaux Pierre Boucher* v. *G. (A.)*, 2009 QCCA 2395, at para. 36.
[36] Recording of the Hearing, Annex 7 to Application, Part 1, at 59 min., 0 sec.; Part 2 at 0 min., 45 sec.

of the Court file, which was held in isolation in the Judge's offices.[37] The gravity of the injustice is compounded by the fact that Judge specifically reproached the Appellants for having failed to access the Court file – which remains in his office to this day. The Judge also reproached wrongfully the Appellants for failing to contact counsel for the parties in the Québec case and for misleading, *quod non*, the B.C. Court with respect to the settlement approval process in Québec. These reproaches are ***directly*** belied by the uncontradicted evidence, which shows that the Appellants contacted CLG and Navistar's counsel, who refused to cooperate fully;[38] and that the Appellants made full disclosure to the B.C. Court.[39]

32. In sum, the Judge exercised his discretion non-judiciously, failed to consider the interests of justice and committed errors of law that justify appellate intervention.[40]

GROUND 3: **The Judge erred in law by approving a *reverse auction* settlement concluded in breach of class counsel's duties of transparency and cooperation and which is contrary to public order.**

33. First, the Judge identified and applied an incomplete legal set of criteria governing settlement approval. Tellingly, the Judge failed to consider or even identify the criteria of "*good faith*" and "*absence of collusion*," which are part of the recognized approval test and were pleaded *in extenso* during the Appellants' argument.[41] This constitutes an error of law that requires appellate intervention.

34. Second, the Judge erred in law by failing to consider that the settlement he approved is against the public order of direction. The Judge did not have the discretion to approve a settlement that violates public order, even though he may have otherwise considered its terms fair and reasonable to class members.[42]

---

[37] See Judgment, at paras. 69 to 71; see Exhibit R-15 to Application, Annex 4 to Application, at p. 2.
[38] Exhibit R-15 to the Intervention, Annex 4 to the Application.
[39] Exhibit R-19 to the Intervention, Annex 4 to the Application.
[40] *Construction Cogerex ltée.* v. *Excavations Gilbert Théorêt*, 2006 QCCA 332, at para. 19; Art. 9 C.C.P; *Brochu* v. *Québec (Société des loteries)*, 2009 QCCS 2678, at paras. 48 and 49; *Vaillancourt* v. *Fafard,* 2005 QCCA 700, at paras. 79 and 80; *Centre de santé et de services sociaux Pierre-Boucher* v. *G. (A.)*, 2009 QCCA 2395, at para. 36; Denis Ferland and Benoit Emery, *Précis de procédure civile du Québec*, vol. 1, Éditions Yvon Blais, 6th ed., 2020, 1-2364.
[41] *Pellemans* v. *Lacroix*, QCCS 1345, at para. 20; *Jacques* v. *189346 Canada Inc.*, 2017 QCCS 4020 (CanLII), at para. 9; *Robillard* v. *Société Canadienne des Postes*, 2021 QCCS 2318, at para. 27.
[42] See *inter alia M.G.* v. *Association Selwyn House*, 2008 QCCS 1345, at para. 20

35. Courts develop norms of public order by reference to the fundamental values of society at any given moment.[43] Early class settlements, especially in multi-jurisdictional proceedings, have raised serious questions by the public recently.[44]

36. *Reverse auction* settlements are a relatively novel tactic deployed recently with increasing frequency by corporate defendants who seek to take advantage of the unique Canadian multi-jurisdictional landscape. This ploy relies on the filing of duplicative regional class actions (akin to the Québec action initiated by CLG which was termed a "*copycat*" class action by the Judge) after the institution of a national class action. A defendant sued simultaneously in multiple provinces then selects the "*least formidable foe*" – generally the least advanced duplicative action – to achieve a discount settlement or an unopposed authorization, which is then used to undermine national class proceedings.[45]

37. The *reverse auction* tactic undermines the objectives of class actions, *i.e.* "*improving access to justice and guaranteeing accountability and behaviour modification in a complex economy where many people can be affected by one illegal practice repeated over and over.*"[46] This tactic also undermines the interest of class members, whose rights are compromised by discount settlements without being adequately informed of the dealings between the settling parties. For these reasons, *reverse auction* settlements threaten the integrity of the administration of the justice and hence violate the public order of direction.[47]

38. *Reverse auction* settlements were condemned in other Canadian provinces, but this question was not raised in Québec previously.[48] The same holds for class settlements concluded in breach of a consortium agreement.[49] The Judge erred in law by failing to recognize that a *reverse auction* settlement violates public order.

---

[43] Pierre Gabriel Jobin and Nathalie Vézina, *Les Obligations*, 7th ed., 2013, EYB2013OBL24, at para. 100.
[44] *Perspectives de réforme de l'Action collective au Québec*, Septembre 2019, at pp. 58 and 62.
[45] See *Kutlu* v. *Laboratories Leon Farma S.A.*, 2015 ONSC 7117, para. 10; see also *Winder* v. *Mariott International Inc.*, 2019 ONSC 5766, para. 58; see also *Clegg* v. *HMQ Ontario*, 2016 ONSC 2662, para. 28.
[46] See *Kirsh* v. *Bristol-Meyers Squibb*, 2021 ONSC 6190, at para. 47, citing *Hafichuk-Walkin et al.*v. *BCE Inc. et al.*, 2016 MBCA 32; *L'Oratoire Saint-Joseph du Mont-Royal* v. *J.J.*, 2019 CSC 35, at para. 6.
[47] On the integrity of justice system and public order: *Côté* v. *Rancourt* [2004] 3 S.C.R. 248, at para. 11.
[48] *Supra* note 45.
[49] *Wilson* v. *Deputy International*, 2018 BCSC 1192, at para. 101.

39. The Judge's legal errors are determinative. Within the correct legal framework, the Judge's own findings of fact would have led to the characterization of the settlement as a *reverse auction*: the Québec action is an *"obvious copycat"*[50]; CLG "*carried out very little activity related specifically to the Québec matter*";[51] CLG failed in its duty to the Québec Court;[52] CLG awaited the outcome of the U.S. action and the B.C. action and entered into the Québec settlement in May 2021, after negotiations between Navistar and the Appellants broke down,[53] indeed after the Appellants filed their notice of intention to proceed in the B.C. Action.[54] The Judge acknowledged that the Québec settlement does not adjust for the value of U.S. currency and that there is "*very little information*" on the bargaining power of plaintiffs in Québec and the U.S.[55] Navistar's own submissions show that the Québec settlement was used to undermine the national class proceedings in B.C.[56]

40. By approving a settlement borne out of a *reverse auction* and concluded in breach of class counsel's duties of transparency to the court and cooperation with the Appellants, the Judge exceeded the boundaries of his discretion and committed errors of law, which are determinative for all the conclusions of the Judgment.

FOR THESE REASONS, MAY IT PLEASE THE COURT:

GRANT the appeal;

SET AIDE the judgment issued on 20 January 2022 by the Honourable Judge Pierre-C. Gagnon of the Superior Court of Québec in the file bearing docket number 500-06-000720-140;

AUTHORIZE the Appellants to intervene in the present class action;

STAY the present class action for a duration of three (3) months;

---

[50] Judgment, Annex 1, at para. 126.
[51] Judgment, Annex 1, at para. 127.
[52] Judgment, Annex 1, at para. 130.
[53] Judgment, Annex 1, at para. 129
[54] Navistar's submissions in B.C., Exhibit R-8 to the Intervention, Annex 4 to the Application, para. 45.
[55] Judgment, Annex 1, paras. 85, 86 and 96.
[56] Navistar's submissions in B.C., Exhibit R-8 to the Intervention, Annex 4 to the Application, para. 45.

RESERVE the Appellants' rights to return before the Superior Court of Québec to request the revision of the judgment issued by the Honourable Judge Pierre-C. Gagnon on 22 June 2021, the revision and redistribution of notices to the Québec class members and the extension of the opt-out deadline;

RESERVE the Appellants' rights to return before the Superior Court of Québec to request 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 by the Supreme Court of British Columbia;

DECLARE that the temporary stay granted pursuant to the judgment to be rendered does not constitute a material modification to the terms of the Québec settlement and that the parties thereto may not invoke such a temporary stay as a grand to withdraw from the settlement.

THE WHOLE with full costs.

MONTRÉAL, 25 February 2022

Woods LLP

Woods LLP
Attorneys for the Appellants
Mtre. Bogdan-Alexandru Dobrota
notification@woods.qc.ca
adobrota@woods.qc.ca
2000, av. McGill College, bureau 1700
Montréal (Québec) H3A 3H3
Tél. 514-982-4545 / Téléc. 514-284-2046
Code BW 0208 / Our reference : 5415-3

CANADA

COURT OF APPEAL OF QUÉBEC

PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL

C.A. : 500-09-
C.S.M. : 500-06-000720-140

N&C TRANSPORTATION LTD.
-and-
FARRIS LLP
-and-
FOREMAN & COMPANY PROFESSIONAL CORPORATION
-and-
ROCHON GENOVA LLP

APPELLANTS – Intervenors

C

4037308 CANADA INC.

RESPONDENT – Plaintiff

-and-

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

RESPONDENTS – Defendants

LIST OF ANNEXES IN SUPPORT OF THE NOTICE OF APPEAL
(Article 352 *C.C.P.*)
Appellants
Dated 25 February 2022

ANNEX 1 : Judgment of the Honourable Pierre-C. Gagnon, Justice of the Superior Court of Québec, issued on 20 January 2022

MONTRÉAL, 25 February 2022

Woods LLP

Woods LLP
Attorneys for the Appellants
Mtre. Bogdan-Alexandru Dobrota
notification@woods.qc.ca
adobrota@woods.qc.ca
2000, av. McGill College, bureau 1700
Montréal (Québec) H3A 3H3
Tél. 514-982-4545 / Téléc. 514-284-2046
Code BW 0208 / Our reference : 5415-3

Within 10 days after notification, the respondent, the intervenors and the impleaded parties must file a representation statement giving the name and contact information of the lawyer representing them or, if they are not represented, a statement indicating as much. If an application for leave to appeal is attached to the notice of appeal, the intervenors and the impleaded parties are only required to file such a statement within 10 days after the judgment granting leave or after the date the judge takes note of the filing of the notice of appeal.

(Article 358 C.C.P.)

No.: 500-09
500-06-000720-140

COURT OF APPEAL OF QUÉBEC
DISTRICT OF MONTRÉAL
PROVINCE OF QUÉBEC

N&C TRANSPORTATION LTD. et als
Applicants/Intervenors

v.

4037308 CANADA INC.
Respondent/Plaintiff

And

NAVISTAR CANADA INC. et als
Respondents/Defendants

NOTICE OF APPEAL
(Article 352 *C.C.P.*), LIST OF ANNEXES AND ANNEX 1
Appellants
Dated 25 February 2022

ORIGINAL

Mtre. Bogdan-Alexandru Dobrota
File No.: 5415-3
Woods LLP
Barristers & Solicitors
2000 McGill College Avenue, Suite 1700
Montréal, Québec H3A 3H3
T 514 982-4545 F 514 284-2046
Notification: notification@woods.qc.ca
Code BW 0208

Notification (Art. 109). The parties shall notify their proceedings (*including briefs and memoranda*) to the appellant and to the other parties who have filed a representation statement by counsel (*or a non-representation statement*).

(Article 25, al. 1 of the Civil Practice Regulations (Court of Appeal))

Failure to File a Representation Statement (Art. 358). If a party fails to file a representation statement by counsel (or non-representation statement), it shall be precluded from filing any other pleading in the file.

The appeal shall be conducted in the absence of such party.

The Clerk is not obliged to notify any notice to such party.

If the statement is filed after the expiry of the time limit, the Clerk may accept the filing subject to conditions that the Clerk may determine.

(Article 30 of the Civil Practice Regulations (Court of Appeal))

CANADA

PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL

C.A.: 500-09-
C.S.M.: 500-06-000720-140

COURT OF APPEAL OF QUÉBEC

N&C TRANSPORTATION LTD., legal person 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 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

APPLICANTS – Intervenors

v.

4037308 CANADA INC., a legal person with its head office at 90 Maisonneuve Street, in the town of Dollard-des-Ormeaux, district of Montréal, Province of Québec, H9B 1K4

RESPONDENT – Plaintiff

-and-

NAVISTAR CANADA INC., a legal person with an establishment at 5500 North Service Road, Burlington, Ontario L7L 6W6
-and-
NAVISTAR, INC., a legal person with its head office at 2601, Navistar DR, Lisle, IL, 60532, U.S.A.
-and-
NAVISTAR INTERNATIONAL CORPORATION, a legal person with its head office at 2601, Navistar DR, Lisle, IL, 60532, U.S.A.

RESPONDENTS – Defendants

DE BENE ESSE APPLICATION FOR LEAVE TO APPEAL
A JUDGMENT APPROVING A CLASS ACTION SETTLEMENT
(Articles 30, al. 2 et 357 _C.C.P._)
Applicants
Dated 25 February 2022

TO ONE OF THE HONOURABLE JUSTICES OF THE COURT OF APPEAL, THE APPLICANTS SUBMIT AS FOLLOWS, _DE BENE ESSE_:

1. On 22 January 2022, the Honourable Pierre-C. Gagnon, J.S.C. (the "**Judge**") granted the application to approve a class action settlement presented by Respondent 4037308 Canada Inc. and – in so doing – dismissed the Intervenors' application to intervene, their request for a temporary stay and their objections to the proposed settlement (the "**Judgment**").[1]

2. The Judgment disposed of the class action and terminated the proceeding. It is therefore appealable as of right.[2] Since the Intervenors are parties to the Judgment, the appeal was validly formed upon filing of the Notice of Appeal.[3]

3. Subsidiarily and *de bene esse*, leave to appeal the Judgment *a quo* is justified given that the grounds of appeal submitted to this Court raise new issues involving questions of principle. These include whether the aggressive and/or conservatory intervention procedure is available to out-of-province class representatives at the settlement approval stage in Québec; and whether a settlement born out of a *reverse auction* in breach of class counsel's duties of information and cooperation is contrary to the public order of direction.

4. The Judge erred in law by holding implicitly that an out-of-province representative of a proposed national class (including Québec members) and its counsel cannot – as a matter of principle – intervene aggressively or in a conservatory manner to protect the rights of absent Québec class members affected by the settlement. The

[1] See the Judgment, Annex 1.
[2] Articles 30, 602 C.C.P.
[3] Article 351 C.C.P., Article 185, para. 2 C.C.P.; see also Notice of Appeal, Annex 2.

Judge mischaracterized not only the remedy sought and the legal grounds of the intervention sought; he also misstated the legal test applicable to aggressive or conservatory interventions at settlement approval (Ground 1).

5. The Judge also erred in law by denying the Intervenors' request to complete their evidence and arguments on an issue the Judge raised during the hearing and considered determinative, *i.e.* the timing of the application to intervene. This constitutes a denial of justice, *a fortiori* since the Applicants had been delayed by the inaccessibility of the Court file, which was held in the Judge's office (Ground 2).

6. Finally, the Judge erred in law by failing to consider whether a *reverse auction* settlement concluded in breach of class counsel's duties of transparency and cooperation is contrary to public order. The Judge truncated the legal test governing settlement approval and ignored his own findings regarding the irregularities of the settlement at issue that suggest collusive dealings (Ground 3).

I. CONTEXT

7. On June 24, 2014, the Applicant-Intervenor N&C Transportation Inc. (**"N&C"**) instituted class action certification proceedings against the Respondent – Defendant entities (**"Navistar"**) in British Columbia (the **"B.C. Action"**), based on hidden defects affecting the engines of trucks manufactured and sold by Navistar.[4]

8. During the second half of 2014, plaintiffs represented by Consumer Law Group (**"CLG"**), including the Respondent-Plaintiff in this case, instituted class action proceedings in Québec and Alberta against Navistar. Plaintiffs represented by the Applicant Rochon Genova LLP and by Harrison Pensa LLP (replaced by Foreman & Company in 2020) (collectively the **"Ontario Counsel"**) instituted class action proceedings against Navistar in Ontario.[5]

9. On November 16, 2016, Justice Skolrood of the Supreme Court of British Columbia certified the B.C. Action as an opt-in proceeding on behalf of a national class,

---

[4] *Application for Leave to Intervene and for a Temporary Stay of the Class Action* (the **"Intervention"**), Annex 3, at pp. 2 to 5.
[5] Intervention, Annex 3, at paras. 27 to 29; Judgment, Annex 1, at pp. 3, 6 and 7.

including the Québec class members.[6] That decision became final on March 28, 2019, when the Supreme Court of Canada dismissed leave to appeal.[7]

10. In May 2019, Applicant Farris LLP, counsel to N&C in the B.C. Action ("**B.C. Counsel**"), together with Ontario Counsel, began settlement discussions with counsel for Navistar on a national, pan-Canadian basis, and entered into a non-disclosure agreement with Navistar to facilitate those discussions.[8]

11. On May 24, 2019, CLG entered into an agreement with B.C. Counsel and Ontario Counsel whereby CLG undertook to coordinate the Québec action and the Alberta actions with the B.C. and Ontario Actions and to cooperate with the Intervenors with respect to any settlement discussions (the "**Consortium Agreement**").[9]

12. Settlement discussions on a pan-Canadian basis continued between Navistar, B.C. Counsel and Ontario Counsel in May and June 2019.[10]

13. On May 28, 2019, Navistar entered into a settlement agreement disposing of parallel class proceedings in the United States (the "**U.S. Settlement**").[11]

14. In late 2019, discussions on a pan-Canadian basis between B.C. Counsel, Ontario Counsel and Navistar broke down. Unbeknownst to the Intervenors, Navistar then initiated private discussions with CLG aimed at settling ***only*** the regional class proceedings initiated by CLG, *inter alia* in Québec.[12]

15. On March 12, 2021, N&C filed and served (including upon Navistar) a notice of intention to proceed with the B.C. Action.[13] N&C intended to transform the B.C. Action into a national opt-out class action, including the Québec members. This came after changes enacted to the B.C. class actions regime in 2018 allowed national opt-out class actions.[14]

---

[6] Exhibit R-2 to the Intervention, Annex 4.
[7] Intervention, Annex 3, at para. 20; see also Exhibit R-3 to R-4 to the Intervention, Annex 4.
[8] Intervention, Annex 3, at paras. 38 and 39.
[9] Intervention, Annex 3, para. 32; Exhibit R-6 to the Intervention, Annex 4.
[10] Intervention, Annex 3, at para. 39.
[11] Judgment, Annex 1, at para. 32; see also Exhibit R-7 to the Intervention, Annex 4.
[12] Affidavit of Edelina Macaspac, dated 18 October 2021, Annex 5, at para. 16a).
[13] Intervention, Annex 3, at para. 42.
[14] Exhibit R-5 to the Intervention, Annex 4; see also Intervention, Annex 3, paras. 21 and following.

16. By March 2021, the activity in the context of the Québec matter was "*very limited.*"[15]

17. On 8 May 2021, unbeknownst to the Intervenors, Navistar, CLG and Respondent 4037308 Canada Inc. entered into the Québec settlement agreement at issue.[16]In June 2021, also unbeknownst to the Intervenors, CLG applied in Québec for leave to distribute notices of settlement to the Québec members.[17]

18. During the hearing held on that application on June 18, 2021, CLG failed to disclose to the Court the intended opt-out national certification proceedings in B.C. CLG also failed to disclose its dealings with B.C. and Ontario Counsel, and incorrectly told the Court that "*nothing has materialized further*" to opt-in certification in B.C.[18]

19. On 10 August 2021, CLG distributed the notices in Québec.[19] The short form notices contained no mention of the B.C. Action. [20] The long form notices contained no mention of the Appellants' proceedings to transform the B.C. Action into an opt-out national class action, which CLG had received, and incorrectly suggested that Québec class members may not be included in the national class.[21] The notices also failed to mention the dollar-value cap that applies to the settlement.

20. The Applicants learned of the notice distribution order in July after it was issued. Between July and October 2021, they sought to obtain the court record from CLG and counsel for Navistar, who refused to cooperate fully.[22] They also sought to obtain the Court record at the Montreal Courthouse but were told the file was withdrawn from public access and held in isolation at the Judge's office.[23]

21. In October 2021, the Applicants contacted the undersigned counsel, who notified the Judge, CLG and counsel for Navistar of the intervention sought by letter dated

---

[15] Judgment, Annex 1, at para. 127.
[16] Intervention, Annex 3, at para. 49 and following; Judgment, Annex 1, at para. 103.
[17] Intervention, Annex 3 at para. 52.
[18] Intervention, Annex 3 at paras. 53 and 54; Exhibit R-12 to the Application, Annex 4.
[19] See *Application for Settlement Approval*, Annex 11 to the Application, at para. 29.
[20] Intervention, Annex 3, at para. 55; see also Exhibit R-13 to the Application, Annex 4.
[21] Application, Annex 3, at para. 56; see also Exhibit R-14 in support of the Application, Annex 4.
[22] Intervention, Annex 3, at paras. 59 and 60; Exhibit R-16 in support of the Intervention, Annex 4.
[23] Exhibit R-16 in support of Intervention, Annex 4: "*We have sought access to such materials from the Court but have been advised that Justice Gagnon retained the court file in his office on an indefinite basis.*"

October 13, 2021.[24] On 15 October 2021, after CLG and Navistar announced their contestation, counsel notified an application to intervene (the "**Intervention**").

22. During the hearing on the Intervention, the Judge raised the time that lapsed between July and October 13, 2021. But he refused to allow the Intervenors to testify or address the Court on this issue[25] and refused to allow undersigned counsel to explain the reasons for the delay, namely the inaccessibility of the Court file and out-of-province practice rules preventing attorney-judge contact.[26]

II. APPLICATION FOR LEAVE TO APPEAL THE JUDGMENT

23. If leave is required, it must be granted because **A**) the appeal raises new questions of principle and public order and **B**) is necessary to correct a denial of justice.

A. THE APPEAL RAISES NEW QUESTIONS OF PRINCIPLE AND PUBLIC ORDER

24. First, the Judge was called upon to rule on a mixed aggressive and conservatory intervention – conservatory because the Intervenors sought to assist and support the absent class members who received inadequate information;[27] aggressive because the Intervenors sought conclusions *against* the parties, including a temporary stay.[28] The Judge erred in law by mistaking the intervention for a "*carriage motion.*" This distorting lens tainted the rest of the Judge's analysis and led to a cascade of legal errors, including the failure to recognize the existence of mixed interventions and misstating the legal criteria governing same.

25. The existence and treatment of mixed interventions inherently raises new questions of law that have only seldom been treated in appeal, and never in a class action setting.[29] The criteria governing conservatory or aggressive interventions in a class action settlement approval context is a new question of law that was never submitted to the Court of Appeal. This alone justifies the leave to appeal.

---

[24] See Judgment, Annex 1, at para. 43; see also Letter to Justice Gagnon, 13 Oct. 2021, Annex 6.
[25] Recording of the Hearing, Annex 7, at Part 1 of 4, at 59 minutes 0 seconds.
[26] Recording of the Hearing, Annex 7, at Part 2 of 4, at 0 minutes, 45 minutes.
[27] Intervention, Annex 3, at paras. 60 to 66 and 67 to 112.
[28] Intervention, Annex 3, at p. 21.
[29] *Cobenco Construction Inc.* c. *Construction Désqurdy*, 1991 CanLII 8174 (QC C.A.).

26. More importantly for Québec class action practice, a mixed aggressive and conservatory intervention is the *only* type of intervention that allows out-of-province national class representatives to adequately protect the interests of Québec class members in situations where, as here, the parties to the proposed settlement fail to make full disclosure to the Court.[30] Only an aggressive or conservatory intervention allows intervenors to file new evidence and seek conclusions against the settling parties to protect interests of absent class members.[31]

27. It is essential that the law governing aggressive and conservatory interventions be clarified and adapted to class actions, much like the law governing friendly interventions was adapted recently by this Court.[32] It is essential that aggressive and conservatory interventions be recognized in class actions and held up to criteria that consider the judge's role as the guardian of absent class members' interests, the parties' duty of transparency to the Court and absent class members' right to adequate information as to the rights compromised by the settlement.[33]

28. Failing such an adaptation, interventions by out-of-province national class representatives at the settlement approval stage in Québec will become extremely difficult, perhaps impossible. The Judge's narrow reading of Article 185 CCP – which jars even with the law on interventions in individual actions[34] and disregards the Intervenors' rights and duties as proposed representatives and counsel to a class that includes Québec class members – could prevent national class representatives from acting in Québec to protect the rights and interests of Québec members included in national classes.

29. Left only with the possibility of friendly interventions, out-of-province class representatives will be unable to complete the evidentiary record and expose irregular tactics between settlement parties, such as *reverse auctions*, a tactic at

---

[30] Judgment, at para. 130; see also letters between counsel for Navistar and the Court, Annex 10.
[31] See *Abichira* v. *Johnston*, 2019 QCCA 657, at para. 36, see also *Institution royale pour l'avancement du des sciences, des gouverneurs de l'Université McGill* c. *Québec*, 2005 CanLII 8151, ¶¶ 4 to 5 (C.S.)
[32] *Abichira* v. *Johnston*, 2019 QCCA 657, at para. 56.
[33] *Abichira* v. *Jonhston*, 2019 QCCA 657, at paras. 42 and 51.
[34] *Belz Avreichim* v. *Trustee Board of the Presbyterian Church*, 2019 QCCA 1110, at para. 5; see also *Union des employés de service* v. *Association démocratique etc.*, 2011 QCCA 2383 at paras. 44 and 50.

issue here and discussed below. Québec class members will be left vulnerable to collusive dealings between defendants and class counsel and the judge's mission at settlement approval stage as the guardian of the interest of absent class members will be significantly hampered.[35]

30. Second, and perhaps most importantly, the appeal raises a novel question of principle as to whether *reverse auction* settlements are against public order especially where, like in the present case, the settlement was concluded in breach of class counsel's duty of transparency, information and cooperation.

31. *Reverse auction* settlements are a relatively novel tactic deployed recently with increasing frequency by corporate defendants who seek to take advantage of the unique Canadian multi-jurisdictional landscape. This ploy relies on the filing of duplicative regional class actions (akin to the Québec action initiated by CLG which was termed a "*copycat*" by the Judge) after the institution of a national class action. A defendant sued simultaneously in multiple provinces then selects the "*least formidable foe*" – generally the least advanced duplicative action – to achieve a discount settlement or an unopposed authorization, which is then used to undermine national class proceedings.[36]

32. The *reverse auction* tactic undermines the objectives of class actions, *i.e.* "*improving access to justice and guaranteeing accountability and behaviour modification in a complex economy where many people can be affected by one illegal practice repeated over and over.*"[37] This tactic also undermines the interest of class members, whose rights are compromised by discount settlements without being adequately informed of the dealings between the settling parties. For these reasons, *reverse auction* settlements threaten the integrity of the administration of justice and hence violate the public order of direction.[38]

---

[35] On the judge's mission at settlement approval, see *Option Consommateurs* v. *Amex Bank of Canada*, 2018 QCCA 305, at paras. 83 to 84.
[36] See *Kutlu* v. *Laboratories Leon Farma S.A.*, 2015 ONSC 7117, para. 10; see also *Winder* v. *Mariott International Inc.*, 2019 ONSC 5766, para. 58; see also *Clegg* v. *HMQ Ontario*, 2016 ONSC 2662, para. 28.
[37] See *Kirsh* v. *Bristol-Meyers Squibb*, 2021 ONSC 6190, at para. 47, citing *Hafichuk-Walkin et al.*v. *BCE Inc. et al.*, 2016 MBCA 32; *L'Oratoire Saint-Joseph du Mont-Royal* v. *J.J.*, 2019 CSC 35, at para. 6.
[38] On integrity of justice system and public order see *Côté* v. *Rancourt* [2004] 3 S.C.R. 248, at para. 11.

33. *Reverse auction* settlements were condemned in other Canadian provinces, but this case is the first known instance where a Québec court was confronted with this issue.[39] The same holds for class settlements concluded in breach of a consortium agreement.[40] The novelty of these questions and their significance for the public interest justify leave to appeal and guidance of this Court becomes necessary considering the growing number of parallel class actions at the national level.

34. The Judge's findings of fact bear all the telltale signs of a *reverse auction* settlement: the Québec action is an *"obvious copycat"*[41]; CLG "*carried out very little activity related specifically to the Québec matter*";[42] CLG failed in its duty to inform the Québec Court;[43] CLG awaited the outcome of the U.S. action and the B.C. action and entered into the Québec settlement in May 2021, after negotiations between Navistar and the Intervenors broke down,[44] indeed after the Intervenors filed their notice of intention to proceed in the B.C. Action.[45] The Judge acknowledged that the Québec settlement does not adjust for the value of U.S. currency and that there is "*very little information*" on the bargaining power of plaintiffs in Québec and the U.S.[46] Navistar's own submissions show that the Québec settlement was used to undermine the national class proceedings in B.C.[47]

35. In approving the settlement, the Judge erred in law by applying a truncated legal test which failed to consider – or even to identify – the requirements of good faith and absence of collusion.[48] In so doing, the Judge exceeded his discretion by approving a settlement that violates public order of direction.[49]

36. Courts develop norms of public order by reference to the fundamental values of society at any given moment.[50] Early class settlements, especially in multi-

---

[39] *Supra* note 31.
[40] *Wilson* v. *Deputy International*, 2018 BCSC 1192, at para. 101.
[41] Judgment, Annex 1, at para. 126.
[42] Judgment, Annex 1, at para. 127.
[43] Judgment, Annex 1, at para. 130.
[44] Judgment, Annex 1, at para. 129
[45] Navistar's submissions in the B.C. Action, Exhibit R-8 in support of the Intervention, Annex 4, para. 45.
[46] Judgment, Annex 1, paras. 85, 86 and 96.
[47] See Navistar's submissions in B.C., Exhibit R-8 to the Intervention, Annex 4, at para. 45 and following.
[48] Judgment, para. 90, cf. *Pellemans* v. *Lacroix*, 2011 QCCS 1345, at para. 20.
[49] *M.G.* v. *Association Selwyn House*, 2008 QCCS 3695, at paras. 22, 63 and 70.
[50] Pierre Gabriel Jobin and Nathalie Vézina, *Les Obligations*, 7th ed., 2013, EYB2013OBL24, at para. 100.

jurisdictional proceedings, have raised serious questions by the public recently[51] and it is essential that the Court of Appeal issue guidance on *reverse auctions*.

37. Without such guidance, Québec could become a haven for *reverse auction* settlements. In the wake of Québec judgments casting doubt upon the execution and enforcement of out-of-province settlement approval orders,[52] companion Québec actions are common alongside pan-Canadian class actions. Without clarity from the Court of Appeal, other defendants sued nationally could replicate Navistar's and CLG's tactics, choose to settle dormant Québec class actions in breach of consortium agreements and compromise the rights of Québec members.

B. THE APPEAL IS NECESSARY TO CORRECT A DENIAL OF JUSTICE

38. The Judge failed in his duty to allow the Intervenors to complete the evidence record and arguments on a point that he raised during the hearing and upon which he dismissed the Intervention,[53] *i.e.* the time lapsed between July 2021 and October 13, 2021, when undersigned counsel first contacted the Judge.

39. During the Intervenors' argument, the Judge refused to hear witness testimony on the very question he had raised regarding the timing of the intervention, stating: "*He* [Mr. Foreman] *is not authorized to address the Court ... you tell me what the proof I have now tells me about what took place and what should have taken place.*" Then, immediately prior to Navistar's argument, he again refused to allow counsel to complete the answer to the Court's question as to the absence of contact with the Court before October 2021 : "*Are you testifying under oath, Mtre. Dobrota? (...) Are you testifying under oath, Mtre. Dobrota? (...) I feel duty-bound to dismiss that observation. We have practice rules in Québec and they apply in Québec. We don't apply B.C. practice rules in Québec.*"[54]

---

[51] Laboratoire sur les Actions Collectives, *Perspectives de réforme de l'Action collective au Québec*, Septembre 2019, Annex 8, at pp. 58 and 62; Louis-Samuel Perron, « *Actions collectives : c'et payant mais pour qui*? » La Presse, 23 juin 2019, Annex 9.
[52] See *Hocking* v. *Haziza*, 2008 QCCA 800; see also *Canada Post Corp.* v. *Lépine*, [2009] 1 S.C.R. 549.
[53] Article 268 C.C.P.; *Protection de la jeunesse -115308*, 2011 QCCA 2147, at para. 54; *Centre de santé et de services sociaux Pierre Boucher* v. *G. (A.)*, 2009 QCCA 2395, at para. 36.
[54] Recording of the Hearing, Annex 7, Part 1 of 4, at 59 min., 0 sec.; Part 2 of 4 at 0 min., 45 sec.

40. The denial of justice is particularly flagrant given that the delay in intervening, for which the Judge reproached the Intervenors, is also owed to the inaccessibility of the Court fille, which was held in isolation in the Judge's offices.[55] The gravity of this injustice is sufficient to warrant leave to appeal and a remedy in appeal.[56]

41. Ultimately, the Judge's unfair reproaches to the Intervenors distorted his analysis and deprived the Québec members of the opportunity to be adequately informed of their rights as potential members of the B.C. action. Those rights remain relevant to this day, since Justice Skolrood in B.C. specifically reserved the Intervenors' option to return before the B.C. Court and expand the national opt-out class pending the outcome of the settlement approval process in Québec.[57]

42. The Judge failed to consider the inadequacy of the information distributed to Québec members in his reasons for approving the settlement, even though he acknowledged that CLG failed to "*keep the case management judges abreast of what was happening (or not happening) in those parallel cases.*"[58] The Judge's failure to allow the Intervenors to complete the record also visited a denial of justice upon the class members that the Judge had a duty to protect.

43. For all these reasons and for the reasons contained in the Notice of Appeal (Annex 2), the appeal has real chances of success and raises novel questions on issues of principle, which transcend the parties' interests and which must be ruled upon in appeal in the best interests of justice, of the class members and of the public.

III. CONCLUSION

44. The Applicants will request this Court *inter alia* to: a) grant the appeal; b) set aside the Judgment; c) authorize the Intervenors to intervene in the present class action; d) stay the present class action for a duration of three (3) months; and e) reserve the Intervenors' right to seek the appropriate remedies from the Superior Court.

---

[55] See Judgment, at paras. 69 to 71; see Exhibit R-15 to Intervention, Annex 4, at p. 2.
[56] *Génest* c. *Belisle*, 2019 QCCA 896, at para. 11; *Vaillancourt* c. *Fafard*, 2005 QCCA 700, para. 79.
[57] *N&C Transportation Ltd.* v. *Navistar International Corp.*, 2021 BCSC 2046 (CanLII), at para. 64.
[58] Judgment, Annex 1, at para. 130.

FOR THESE REASONS, MAY IT PLEASE THE COURT:

De bene esse, **GRANT** the present application;

De bene esse, **GRANT** the Intervenors leave to appeal the judgment issued on 22 January 2022 by the Honourable Judge Pierre-C. Gagnon of the Superior Court of Québec in the file bearing docket number 500-06-000720-140;

THE WHOLE with full cost.

MONTRÉAL, 25 February 2022

Woods LLP

Woods LLP
Attorneys for the Applicants-Intervenors
Mtre. Bogdan-Alexandru Dobrota
notification@woods.qc.ca
adobrota@woods.qc.ca
2000, av. McGill College, bureau 1700
Montréal (Québec) H3A 3H3
Tél. 514-982-4545 / Téléc. 514-284-2046
Code BW 0208 / Our reference : 5415-3

CANADA

COURT OF APPEAL OF QUÉBEC

PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL

C.A. : 500-09-
C.S.M. : 500-06-000720-140

N&C TRANSPORTATION LTD.
-and-
FARRIS LLP
-and-
FOREMAN & COMPANY PROFESSIONAL CORPORATION
-and-
ROCHON GENOVA LLP

APPLICANTS – Intervenors

C

4037308 CANADA INC.

RESPONDENT – Plaintiff

-and-

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

RESPONDENTS – Defendants

AFFIDAVIT OF MR. ROBERT S. ANDERSON, Q.C.
Applicants
Dated 25 February 2022

I, the undersigned, Robert S. Anderson, attorney and 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 present *De Bene Esse Application for Leave to Appeal a Judgment Approving a Class Action Settlement* (the "**Application**");

3. Based on my personal knowledge and my review of the materials that were filed in the record of the Superior Court of Québec in the present matter by the Intervenors and the materials that were filed by the Plaintiff N&C Transportation Limited in the record of the Supreme Court of British Columbia, all the facts alleged in the present Application are true.

AND I HAVE SIGNED IN VANCOUVER, BRITISH COLUMBIA

ROBERT S. ANDERSON, Q.C.

Solemnly affirmed before me by technological means this 25th February 2022

Louise Dompierre

COMMISSIONNER OF OATHS

NOTICE OF PRESENTATION

TO :

4037308 Canada Inc.
90 Maisonneuve Street,
Dollard-des-Ormeaux (Québec)
H9B 1K4

Respondent – Plaintiff – Class Representative

Me Jeffrey Orenstein
Me Andrea Grass
CONSUMER LAW GROUP
1030 Berri Street, Suite 102
Montréal (Québec) H2L 4C3

Counsel to the Respondent – Plaintiff

NAVISTAR CANADA INC.
5500 North Side Service Road 401
Burlington, Ontario L7R 6W6

NAVISTAR INC.
NAVISTAR INTERNATIONAL CORP.
2601, Navistar DR, Lisle, IL, 60532, U.S.A.

Respondents – Defendants

Me Jean Lortie
Me Samuel Lepage
MCCARTHY TÉTRAULT LLP
1000 de la Gauchetière Street, West
Montréal (Québec) H3B 4W5

Counsel to the Respondents – Defendants

TAKE NOTICE THAT TAKE NOTICE that the present *De Bene Esse Application for leave to appeal a judgment approving a class action settlement* will be presented for adjudication before one of the Honourable Judges of the Court of Appeal, on **March 24, 2022**, in the virtual court room RC-18 at 9:30 am.

DO GOVERN YOURSELVES ACCORDINGLY

MONTRÉAL, 25 February 2022

Woods LLP

Woods LLP
Attorneys for the Applicants-Intervenors
Mtre. Bogdan-Alexandru Dobrota
notification@woods.qc.ca
adobrota@woods.qc.ca
2000, av. McGill College, bureau 1700
Montréal (Québec) H3A 3H3
Tél. 514-982-4545 / Téléc. 514-284-2046
Code BW 0208 / Our reference : 5415-3

CANADA

COURT OF APPEAL OF QUÉBEC

PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL

C.A. : 500-09-
C.S.M. : 500-06-000720-140

N&C TRANSPORTATION LTD.
-and-
FARRIS LLP
-and-
FOREMAN & COMPANY PROFESSIONAL CORPORATION
-and-
ROCHON GENOVA LLP

APPLICANTS – Intervenors

C

4037308 CANADA INC.

RESPONDENT – Plaintiff

-and-

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

RESPONDENTS – Defendants

LIST OF ANNEXES IN SUPPORT OF
***DE BENE ESSE* APPLICATION FOR LEAVE TO APPEAL**
Applicants
Dated 25 February 2022

ANNEX 1 : Judgment by Honorable Pierre-C. Gagnon, J.C.S., dated 22 January 2022 and minutes of the hearing held 20 October 2021

ANNEX 2 : Notice of Appeal dated 25 February 2022

ANNEX 3 : Application for leave to intervene and for a temporary stay of the class action, dated 15 October 2021

ANNEX 4 : *En liasse*, Exhibits R-1 to R-19 to the Application for leave to intervene and for a temporary stay of the class action (for convenience, Exhibit R-19 is an excerpt *only* of the exhibit that was filed in the Court record)

ANNEX 5 : Affidavit of Edelina Macascpac dated 18 October 2021

ANNEX 6 : Letter to Justice Gagnon dated 13 October 2021

ANNEX 7 : Electronic recording of the hearing held before Justice Gagnon on 20 October 2021

ANNEX 8 : Laboratory on class actions of the Faculty of Law of the University of Montréal, « *Perspectives de réforme de l'action collective au Québec*, » Report prepared to the attention of the Ministry of Justice of Québec, September 2019

ANNEX 9 : Louis-Samuel Perron, « *Actions collectives : c'est payant, mais pour qui* ? », La Presse, 23 June 2019

ANNEX 10 : Letters and emails between counsel for Navistar and the Superior Court, between 7 June 2018 and 3 June 2019

ANNEX 11 : Application for settlement approval, October 15, 2021

ANNEX 12 : Email from undersigned counsel to CLG and counsel for Navistar, February 25, 2022

MONTRÉAL, 25 February 2022

Woods LLP

Woods LLP
Attorneys for the Applicants-Intervenors
Mtre. Bogdan-Alexandru Dobrota
notification@woods.qc.ca
adobrota@woods.qc.ca
2000, av. McGill College, bureau 1700
Montréal (Québec) H3A 3H3
Tél. 514-982-4545 / Téléc. 514-284-2046
Code BW 0208 / Our reference : 5415-3

No.: 500-09
500-06-000720-140

COURT OF APPEAL OF QUÉBEC
DISTRICT OF MONTRÉAL
PROVINCE OF QUÉBEC

N&C TRANSPORTATION LTD. et als
Applicants/Intervenors

v.

4037308 CANADA INC.
Respondent/Plaintiff

And

NAVISTAR CANADA INC. et als
Respondents/Defendants

***DE BENE ESSE* APPLICATION FOR LEAVE TO APPEAL A JUDGMENT APPROVING A CLASS ACTION SETTLEMENT, AFFIDAVIT, NOTICE OF PRESENTATION, LIST OF ANNEXES AND ANNEXES 1 TO 12**
(Articles 30, al. 2 and 357 C.C.P.)
Appellants
Dated 25 February 2022

ORIGINAL

Mtre. Bogdan-Alexandru Dobrota
File No.: 5415-3
Woods LLP
Barristers & Solicitors
2000 McGill College Avenue, Suite 1700
Montréal, Québec H3A 3H3
T 514 982-4545 F 514 284-2046
Notification: notification@woods.qc.ca
Code BW 0208

Woods