SUPERIOR COURT

(Class Action)

CANADA
PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL

No: 500-06-000720-140

DATE: January 20, 2022

PRESENT: THE HONOURABLE PIERRE-C. GAGNON, J.S.C.

4037308 CANADA INC.
Representative Plaintiff
v.
NAVISTAR CANADA ULC
and
NAVISTAR, INC.
and
NAVISTAR INTERNATIONAL CORPORATION
Defendants
and
N&C TRANSPORTATION LTD.
and
FARRIS LLP
and
FOREMAN & COMPANY PROFESSIONAL CORPORATION
and
ROCHON GENOVA LP
Intervenors

JUDGMENT ON AN APPLICATION TO INTERVENE AND ON AN APPLICATION TO APPROVE A SETTLEMENT

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[1] This is a class action initiated in 2014, and authorized for settlement purposes (only) by judgment dated June 22, 2021[1]. The judgment approved as well notices to the members, to be disseminated in the Province of Québec. It also set the date of October 20, 2021 to proceed on Representative Plaintiff's Application to Approve the Settlement Agreement dated May 6, 2021 (and the Modification to the Settlement Agreement dated September 14 and 15, 2021).

[2] On October 15, 2021, the Intervenors filed an application to be presented on October 20, 2021 (five days later) for leave to intervene and for a temporary stay of the class action.

[3] The Intervenors are:

- N&C Transportation Ltd. ("N&C"), Representative Plaintiff in the "British Columbia class action" to be further described below;
- Farris LLP, counsel for "N&C" in the "British Columbia class action";
- Foreman & Company Professional Corporation and Rochon Genova LLP, co-counsel for the Representative Plaintiff in the "Ontario class action (Stayura)" to be further described below.

[4] In essence, the Intervenors argued that the settlement in the present "Québec class action" should not be approved but rather stayed in order to grant precedence to the British Columbia class action. In their view, the Québec Settlement Agreement should be considered a "reverse auction" that is unfavourable to Québec class members when compared to terms agreed upon in other jurisdictions.

[5] At the hearing on October 20, 2021, the Navistar defendants filed their contestations of the application by the Intervenors. The application is also opposed by the Plaintiff.

[6] Therefore, this Court must decide whether the Application to Approve the Settlement Agreement should be stayed and if not, whether to grant or withhold such approval.

A. BACKGROUND

[7] The fundamental issue of the class actions is the design, manufacture and sale by the Navistar defendants of heavy-duty diesel trucks equipped with a specific type of exhaust control system.

[8] It is alleged that certain truck engines marketed as "Navistar MaxxForce Advanced Exhaust Gas Recirculation [EGR]" (engines) are defective, causing repeated

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[1] 2021 QCCS 2621.

engine failures and frequent repairs, and rendering the trucks un-merchantable, unreliable and unsuitable for use.

A.1 The Québec Class Action

[9] This Québec class action was commenced on November 28, 2014 by Consumer Law Group, seeking pecuniary damages for a class to be composed of natural and moral persons residing in Canada[2] and having purchased or leased, one of the trucks so described.

[10] As will be further described below, the Québec class action was essentially stayed, without significant procedural progress, until the Settlement Agreement was executed on May 6, 2021 (6 ½ years later).

[11] On July 17, 2015, Justice Corriveau granted an initial stay, until July 17, 2016.

[12] On November 23, 2017, the Navistar defendants applied again for a "short" stay. They identified the case of N&C, under the management of Mr. Justice Skolrood of Vancouver, British Columbia, who had certified the class action on November 16, 2016. Navistar declared having filed an appeal to be heard by the Court of Appeal of British Columbia on February 9, 2018.

[13] On December 7, 2017, the undersigned granted a second stay to be in effect until the Court of Appeal of British Columbia would deliver judgment in the case of N&C.

[14] On August 1st, 2018, the Court of Appeal dismissed the appeal by Navistar and thereby upheld the certification of the "British Columbia class action".[3]

[15] On September 6, 2018, Justice Chatelain granted a third stay to be in effect until the Supreme Court of Canada ruled on Navistar's application for leave to appeal in the case of N&C.

[16] The Supreme Court of Canada dismissed the application for leave on March 28, 2019.[4]

[17] On May 31, 2019, Justice Chatelain was further informed by email that the parties were negotiating. Justice Chatelain replied that she required a further report by June 21, 2019.

[18] The Court file remained in abeyance until Justice Chatelain was informed in May 2021 that a settlement had recently been achieved.

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2 The Québec Settlement Agreement redefines the class as one of Québec residents.
3 2018 BCCA 312.
4 File nº 38327.

[19] As mentioned, during that period, there was little procedural activity, save for an application by Navistar to adduce relevant evidence and to examine of representative plaintiff (Mr. Tariq Amirzaman), granted on June 5, 2017.

[20] The elements of the Québec Settlement Agreement are examined below in sub-section C.1.

A.2 More about the British Columbia Class Action

[21] This Court is informed that:

(a) Mr. Justice Skolrood of the Supreme Court of British Columbia appears to have managed the case since the outset;

(b) Justice Skolrood certified the class action on November 16, 2016.[5] The class was defined as follows:

Class definition

All persons resident in Canada that purchased heavy duty Class B 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.

(c) The class period was set to begin on January 1st, 2009;

(d) At the time, the *Class Proceedings Act*[6] provided for an opt-in scheme, meaning that non-residents of British Columbia could join the class by positively notifying of their decision to join. Therefore, Québec residents were not members unless they opted-in;

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5 2016 BCSC 2129.

6 R.S.B.C. 1996, c. 50.

(e) The Court of Appeal of Canada and the Supreme Court of Canada successively denied Navistar's appeals;

(f) There was no procedural activity before Justice Skolrood during more than two years after the Supreme Court of Canada denied leave on March 28, 2019;

(g) On September 1st, 2021, N&C filed its notice of application to recertify the class action as a multi-jurisdictional class proceeding, in which the class would be redefined to include residents of British Columbia or of any other Canadian province unless they opt out;

(h) Thereby, N&C intended to benefit from the *Class Proceedings Amendment Act, 2018,*[7] brought into force on October 1st, 2018, modifying the scheme of class actions in British Columbia from an opt-in model to a national opt-out model;

(i) The application by N&C stated (wrongly) that the Québec class action was stayed and had not moved forward since 2018;

(j) The application was heard on October 13, 2021 (7 days before the hearing to take place in Québec);

(k) On October 19, 2021, Justice Skolrood ruled on N&C's application[8]. Here is the main conclusion of his judgment:

> **Conclusion**
>
> [64] In summary, considering all of the circumstances and the relevant factors identified in the *CPA,* I find that this action should properly be certified as a multi-jurisdictional class proceeding with the class comprising all residents of Canada who meet the class definition, except those resident in Quebec. I order that the certification order be amended accordingly. I agree with the defendants that the Quebec process must be permitted to run its course, however this order will be without prejudice to the plaintiffs' right to apply to further amend the certification order to include residents of Quebec, depending upon the outcome of the Quebec settlement hearing.

(l) In the judgment, Justice Skolrood writes of being aware that a hearing is scheduled on October 20, 2021 before the Superior Court of Québec on an application to approve the Québec Settlement Agreement;[9]

(m) Justice Skolrood also mentions being aware of a settlement achieved on September 15, 2021 in the "Alberta class action" (further described below).[10]

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7 S.B.C. 2018, c. 16.
8 2021 BCSC 2046.
9 *Idem*, at para 21.
10 *Idem*, at para 23.

A.3 The Ontario Class Action (Stayura)

[22] Relatively little needs to be summarized here about the Ontario class action.

[23] N&C's application filed on September 1st, 2021 identifies the case of *Stayura Well Services Ltd. & al* v. *Navistar Canada Inc. & al*, the Representative Plaintiff being jointly represented by Foreman & Company Professional Corporation and Rochon Genova LLP (two of the Intervenors in this instant matter).

[24] No certification hearing has taken place in this matter. It is explained that class counsel in the Ontario class action have agreed to give precedence to the British Columbia class action, due to the existence of a consortium agreement (to be discussed later).

[25] This Court notes the existence of a second class action proceeding in Ontario, *R&A Transport Corp.* v. *Navistar Canada Inc. et al.*[11] There has been no procedural progress since the initial filing on February 17, 2015. Class counsel is Consumer Law Group, the same as in the Québec and Alberta class actions. No further mention of the "R&A Proceeding" is useful for the purpose of this judgment.

A.4 The Alberta Class Action

[26] Consumer Law Group is also class counsel in the matter of *Andes Transport Inc.* c. *Navistar Canada Inc. et al.*[12]. When N&C filed its application on September 1st, 2021, it was unaware of any procedural progress since the initial filing on November 10, 2014.

[27] However (as already mentioned) the parties concluded a settlement agreement on September 15, 2021.

[28] On December 7, 2021 (while the present matter was under advisement) this Court was informed by counsel for N&C that it was seeking leave to intervene in the Alberta class action, to have it struck or stayed as an abuse of process. The scheduled hearing date was December 17, 2021.

[29] This Court understands that, in Alberta as well as in Québec, N&C seeks that precedence be given to the British Columbia class action, as a national (Canada-wide) opt-out action.

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11 Ontario Superior Court of Justice, nº 15-63387.
12 Alberta Court of Queen's Bench, nº 1403 16425.

A.5 The Manitoba Class Action

[30] It should be briefly acknowledged that another class action was filed in Manitoba by class counsel Merchant Law Group, in *Brown* v. *Navistar Canada Inc.& al.*[13] There has been some procedural activity but the Court has yet to rule on certification.

[31] Merchant Law Group does not belong to the consortium identified by the Intervenors in the present matter.

A.6 The U.S. Class Action

[32] It is also appropriate to list the multidistrict litigation (MDL)[14] that was assigned to the Honorable Joan B. Gottschall of the United States District Court for the Northern District of Illinois.

[33] The main reason is that the parties compare the Québec Settlement Agreement to the settlement agreement dated May 28, 2019[15] approved by Justice Gottschall on January 21, 2020.[16] This as well will be discussed below.

B. THE INTERVENTION

B.1 The Position of the Intervenors

[34] What follows is a summary of the Application for Leave to Intervene dated October 15, 2021.

[35] The Intervenors contend that, since 2018, a consortium agreement[17] has existed, binding class counsel in the British Columbia class action and the Ontario class action (Stayura), as well as Consumer Law Group being class counsel in the Québec and the Alberta class actions.

[36] Consumer Law Group denies being party to any consortium agreement, in particular when the Québec Settlement Agreement was signed on May 6, 2021.

[37] The parties all agree that whether or not Consumer Law Group was or is bound by a consortium agreement, is a contractual dispute that is beyond the scope of this judgment. This Court is not called upon to rule on the rights and obligations of any law firm or party in performance of a consortium agreement.

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13 Manitoba Court of Queen's Bench, nº CI-14-01-90962

14 *In re : Navistar Maxxforce Engines Marketing, Sales Practices and Products Liability Litigation*, MDL Nº 2590.

15 Exhibit "B" to the affidavit by Mr. Luis Torres Jr., dated October 18, 2021.

16 Exhibit "D" to the Torres affidavit

17 Exhibit R-6. It is specified that in 2020, Foreman & Company replaced Harrison Penske LLP as co-counsel to Rochon Genova LLP

[38] In any event, the Intervenors stated that, on May 1st, 2019, class counsel in the British Columbia class action, class counsel in the Ontario class action (*Stayura*) entered into a non-disclosure agreement with Navistar[18] and began settlement discussions.

[39] No settlement has resulted from these discussions.[19]

[40] In March 2021, N&C filed a notice of its intention to re-activate the British Columbia class action, obviously left in abeyance during the course of the negotiations. However, as already mentioned, the Supreme Court of British Columbia was officially seized by N&C's application on September 1st, 2021.

[41] On March 16, 2021, Mtre Orenstein of Consumer Law Group sent an email informing the consortium of his intention to proceed independently with the Québec class action, leading to strong objections by the consortium.

[42] The Intervenors complained of not being informed before July 2021 that:

- Consumer Law Group and Navistar had executed the Québec Settlement Agreement on May 6, 2021;
- Consumer Law Group then brought an application before this Court that lead to a hearing on June 18, 2021 and to a preliminary judgment dated June 22, 2021 setting October 1st, 2021 as the "opt-out date" and October 20, 2021 as the date for the settlement approval hearing.

[43] At no time did the Intervenors explain why they waited until October 13, 2021[20] to contact this Court and the other parties in this matter.

[44] The Intervenors argued that the public notices approved by this Court on June 22, 2021 (and disseminated in accordance with the notice plan) failed to indicate properly that one option open to Québec residents was to opt-in to the British Columbia class action.[21] It is particularly disturbing that the Intervenors allowed the opt-out period to elapse[22] before raising that the terms of notification were ambiguous.

[45] The Intervenors also suggest that the proposed settlement in the Alberta class action signed on September 15, 2021, is part of a scheme by Consumer Law Group and Navistar to undermine the proper progress of the British Columbia class action (as well as that of the Ontario class action).

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18 Not filed in these proceedings.

19 The negotiations eventually broke down (para 107 of the Application for leave to intervene). They appear to be at a standstill.

20 Letter by Mtre Dobrota dated October 13, 2021 advising of the intention to file an application "*by the end of the present week*".

21 Not yet modified to the opt-out model, as per the judgment by Justice Skolrood dated October 19, 2021.

22 The opt-out period ended on October 1st, 2021.

[46] The Intervenors argued that the Québec Settlement Agreement was modeled on the U.S. settlement, but inadequately, as provincial civil liability regimes across Canada protect customers much better than their United States counterparts. For instance, some U.S. jurisdictions bar the recovery of pure economic loss.

[47] Despite the stronger legal position of Québec-based plaintiffs, the Québec Settlement Agreement contains terms less favourable than those of the U.S. settlement.

[48] The Intervenors continued opposing what they see as Navistar's strategy of concluding different regional settlements in Canada to undermine Intervenors' "national litigation strategy".

[49] Also, the Intervenors blamed Consumer Law Group for having mentioned (in the Québec application for authorization) the expert report of Dr. Jim Cowart, whose services were retained for the benefit of the consortium only.

[50] The Intervenors concluded by requesting that the Québec class action be stayed in order to allow Justice Skolrood to rule on their pending request that the national class action in British Columbia be modified to include Québec residents in the class as well.

B.2 The Position of Navistar

[51] In their written contestation dated October 20, 2021, the Navistar defendants opposed the intervention.

[52] They insisted on N&C's inertia after the British Columbia class action had been certified:

- as non-residents of British Columbia had the possibility to opt-in (only) until September 30, 2019, no public notice was published in Québec or anywhere outside of British Columbia to invite "opt-ins";
- British Columbia moved to an opt-out regime on October 1st, 2018 but N&C did not apply to take advantage of that feature until September 1st, 2021;
- there was no procedural activity in the British Columbia class action between the ruling by the Supreme Court of Canada on March 28, 2019, and N&C's first indication of reactivating its case in March 2021; and then, N&C only filed its formal proceedings five months later, on September 1st, 2021;
- there was no legal requirement under Québec rules to advise the Intervenors of developments in the Québec class action;
- Québec class members were duly informed of the existence of the British Columbia class action, regardless of the advisability of opting out in Québec in favour of an idle class action in British Columbia;

- the National Litigation Plan filed by N&C before Justice Skolrood is completely silent about the application of Québec civil law to Québec members;

- the *Code of Civil Procedure* ("C.C.P.") does not allow an intervention of the kind sought by the Intervenors; and does not allow them to seek the conclusions stated in the application;

- the Québec Settlement Agreement is tailored to the law as it applies in Québec, is fair and falls within a range of reasonableness.

B.3 Analysis and Decision

[53] The Application for Leave to Intervene shall be denied.

[54] Firstly, the Intervenors brought forward a carriage motion in a flimsy disguise. Basically, they contended that a national (Canada-wide) class action must be favoured as it provides greater bargaining power than a province-only class action, lest the defendant will strive to balkanize the opposition and achieve settlements that are less favourable to the members of the class (or classes).

[55] However, this Court must rule impartially. Even after authorization/certification is achieved, the role of the court is not to favour a plaintiff and to assist in maximizing a strategy meant to weaken a defendant.

[56] Since the inception of class actions in 1978, Québec courts have resisted all attempts to recognize carriage motions in this jurisdiction, as they are considered much too time-consuming.[23]

[57] The *Civil Code of Québec* ("C.C.Q.") and the *Code of Civil Procedure* express the will of the legislator that Québec-only class actions be the norm and that Canada-wide ("national") class actions, while possible, will be authorized only when additional criteria are met.

[58] Québec courts cannot postulate that Québec-only class actions must cede precedence to class actions with a larger membership base. Article 577 C.C.P. dictates a contrary position:

577. The court cannot refuse to authorize a class action on the sole ground that the class members are part of a multi-jurisdictional class action already under way outside Québec.	**577.** Le tribunal ne peut refuser d'autoriser l'exercice d'une action collective en se fondant sur le seul fait que les membres du groupe décrit font partie d'une action collective

[23] *Hotte* v. *Servier*, [1999] R.J.Q. 2598 (C.A.); *Gauthier* v. *General Motors du Canada ltée*, J.E. 2006-124 (S.C.); *Option consommateurs* v. *Banque Amex du Canada*, 2006 QCCS 4011; *Option consommateurs* v. *Pfizer Canada inc.*, J.E. 2005-2030 (S.C.); *Schmidt* v. *Johnson & Johnson*, 2012 QCCA 2132; *Cohen* v. *LG Chem Ltd.*, 2017 QCCA 94.

If asked to decline jurisdiction, to stay an application for authorization to institute a class action or to stay a class action, the court is required to have regard for the protection of the rights and interests of Québec residents. If a multi-jurisdictional class action has been instituted outside Québec, the court, in order to protect the rights and interests of class members resident in Québec, may disallow the discontinuance of an application for authorization, or authorize another plaintiff or representative plaintiff to institute a class action involving the same subject matter and the same class if it is convinced that the class members' interests would thus be better served.	Il est tenu, s'il lui est demandé de décliner compétence ou de suspendre une demande d'autorisation d'une action collective ou une telle action, de prendre en considération dans sa décision la protection des droits et des intérêts des résidents du Québec. Il peut aussi, si une action collective multiterritoriale est intentée à l'extérieur du Québec, refuser, pour assurer la protection des droits et des intérêts des membres du Québec, le désistement d'une demande d'autorisation ou encore autoriser l'exercice par un autre demandeur ou représentant d'une action collective ayant le même objet et visant le même groupe s'il est convaincu qu'elle assure mieux l'intérêt des membres.

[59] Secondly, it is apparent that the Intervenors are attempting to strike back at Consumer Law Group that, in their view, has reneged on a consortium agreement.

[60] As already mentioned, and as all the parties concede, this court is not called upon to rule on a contractual dispute and to decide who may have misbehaved in this regard.

[61] Thirdly, if the Court were ever to determine who between the Intervenors and Consumer Law Group is in a better position to protect the interests of Québec members, the Intervenors would not stand a realistic chance.

[62] On the one hand, we have a Québec class action where a Québec Settlement Agreement has been agreed upon, suggesting that the class members may receive some form of indemnity in the near future.

[63] On the other hand, we have a British Columbia class action where negotiations have broken down and that has only inched ahead since the Supreme Court of Canada removed the hurdles to certification in March 2019.

[64] The Intervenors may be convinced that they are in a position to achieve a much better outcome for the Québec class members than what is stipulated in the Québec Settlement Agreement. But the Court must base its ruling on facts, not on masterplans that may not be achieved for many months, if ever.

[65] Fourthly, the *Code of Civil Procedure* does not recognize the type of intervention attempted here.

[66] Section 185 C.C.P. allows aggressive intervention when a third person asserts, against the parties or one of them, a right which is in dispute. This is not the case here.

[67] Section 185 C.C.P. also allows conservatory intervention when a third person wishes to be substituted for one of the parties to represent it, or to be joined with one of the parties to assist it or to support its claims. This is not the case either.

[68] That the outcome of the Québec class action could influence the outcome of the British Columbia class action, is insufficient to justify an intervention.[24]

[69] The Intervenors might have qualified under section 187 C.C.P. as friends of the court.[25] But the Intervenors disqualified themselves by their hostile strategy of contacting this Court mere days before the hearing on October 20, 2021, although they acknowledge having known about the controversy "*in July 2021*".[26]

[70] In their application to Justice Skolrood on September 1st, 2021, the Intervenors wrongly informed him that the Québec class action had been stayed since 2018.

[71] In so doing, the Intervenors failed to verify the status of the Québec class action,

- by consulting the (public) court file;
- by contacting counsel for the parties in the Québec case;
- by accessing the (public) court ledger (*plumitif*);
- by accessing the (public) class actions registry, where the judgment dated June 22, 2021 was published at length, hours after being released.

[72] The Intervenors have failed throughout to display any serious concern for the best interests of Québec-based members.

[73] Finally, it is clear that the three law firms had no legal standing to file an intervention under the *Code of Civil Procedure*. They are not even a party to the British Columbia Class Action.

[74] The Application for Leave to Intervene shall be dismissed, with costs.

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[24] *Fédération des producteurs acéricoles du Québec* v. *Turgeon*, 2012 QCCA 974; *Second Cup Ltd.* v. *Hébert*, 2019 QCCA 1838.

[25] As allowed by the Court of Appeal in *Abihsira* v. *Johnston*, 2019 QCCA 657.

[26] Para 58 of the Application for Leave to Intervene.

[75] The Court must now examine whether the Québec Settlement Agreement should be approved as fair, reasonable and in the best interest of the class members.

C. APPROVAL OF THE QUÉBEC SETTLEMENT AGREEMENT

[76] It is necessary to describe the main features of the Québec Settlement Agreement followed by those of the U.S. Settlement Agreement, in order to appreciate the relevant comparisons between the two.

C.1 Main Features of the Québec Settlement Agreement

[77] The Québec Settlement Agreement (the "QSA") provides for an all-inclusive common fund of $3,002,280 (all amounts in Canadian dollars).

[78] Part of these monies are available in the Rebate Fund set at a face value of $160,122. Also, $790,600.50 (plus taxes) are set aside to pay Class Counsel Fees and Costs.

[79] Members of the class may submit a claim for one of the following three options of compensation (per vehicle):

(a) Cash Option: payment based on the number of months of ownership or lease of a vehicle, up to a maximum of $2,500 per Class Vehicle;

(b) Rebate Option: rebate based on the number of months of ownership or lease of a vehicle, up to $10,000 towards the purchase of a new Navistar Class 8 heavy duty truck. The rebates are available during a period of 18 months. A class member cannot apply for more than 10 rebates, regardless of the number of vehicles owned or leased;

(c) Individual Prove-Up Option: reimbursement as approved by the Settlement Administrator of up to $15,000 per Class Vehicle, for certain "Covered Costs" defined in the QSA. There is a cap of $7,500 (instead of $15,000) for vehicles with 800,000 km or more on the odometer.

[80] The claim submissions must be filed before 180 days have elapsed after the Second Class Notice.

[81] The Settlement Website is to contain an interactive portal designed to facilitate claims by reducing entry errors (as each Class Vehicle needs to be identified individually).

C.2 Main Features of the U.S. Settlement Agreement

[82] The U.S. Settlement Agreement provides for an all-inclusive fund of $135 million (all amounts in U.S. dollars).

[83] This amount is composed of a cash fund of $85 million and of a rebate fund with a face value of $50 million. A "waterfall provision" allows the transfer of $35 million from the rebate fund (thus reduced to $15 million) in order to increase the cash fund to $120 million.

[84] Indeed, the waterfall provision has been activated, in order, among other reasons to better acquit fees, costs and service awards totalling $40,725,000 to class counsel and (29) named plaintiffs.

[85] As a result, the U.S. class members have received the following compensation, all in U.S. dollars:

- up to $2,500 per vehicle (cash);
- $10,000 rebate per vehicle;
- up to $15,000 for the individual prove-up option.

[86] The parties to the QSA submitted that it was designed to indemnify Québec class members similarly to U.S. class members, but without adjusting the exchange rate between Canadian and U.S. dollars:

(a) assuming that there are approximately 1,667 Class Vehicles in Québec, compared to 66,518 vehicles in the U.S.:

(b) considering that no plaintiff's honorarium is payable according to the QSA;

(c) considering that class counsel fees sought in Québec would equal approximately 30% of the cash fund instead of 33% in the U.S.;

(d) considering that defendants in the U.S. are generally exposed to costly civil jury awards and massive punitive damages, but not defendants in Québec.

C.3 Legal principles applicable to approval of a settlement agreement

[87] Article 590 C.C.P. requires that a settlement agreement ("transaction") putting an end to a class action be approved by the Court. If, indeed, a judgment approves the transaction, it must determine the mechanics of its execution.

[88] Case law has consistently stressed that a settlement agreement shall only be approved if it is reasonable, fair, appropriate and in the best interest of the class members.[27]

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[27] *Jacques* v. *189346 Canada inc. (Pétroles Therrien inc.)*, 2017 QCCS 4020.

[89] In *Option consommateurs* v. *Banque Amex du Canada*,[28] the Court of Appeal approves the position of practitioner Mtre Yves Lauzon:

> Le Tribunal n'a pas le pouvoir de modifier la transaction à sa seule initiative. Il doit respecter la volonté des parties qui ont librement transigé dans les limites des compromis qu'elles ont jugés possibles avant d'en arriver à une entente. Sur cette base, il doit en principe l'approuver telle qu'elle lui est présentée ou la refuser selon son appréciation en fonction des critères applicables.[29]

[90] To that effect, the court is to weigh different factors, often described as follows:

> [34] Une transaction conclue dans le cadre d'un recours collectif n'est valable que si elle est approuvée par le tribunal. Avant d'approuver une transaction, le tribunal détermine si elle est juste, raisonnable et au mieux des intérêts du groupe pris dans son ensemble.
>
> [35] Le Tribunal peut tenir compte de divers facteurs afin de décider d'approuver une transaction relative à un recours collectif, dont les suivants :
>
> (1) la probabilité de récupération ou la probabilité de réussite;
>
> (2) les frais futurs et la prolongation probable du litige si la question n'est pas réglée;
>
> (3) les modalités et les conditions de la transaction;
>
> (4) le montant et la nature de l'enquête préalable, de la preuve ou de l'examen;
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> (5) la présence de négociations de pleine concurrence et l'absence de collusion;
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> (6) la compétence et l'expérience de l'avocat;
>
> (7) le nombre d'opposants et la nature des oppositions;
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> (8) la possibilité de se prévaloir d'une option de retrait si le membre du groupe n'est pas satisfait des modalités de la transaction; et
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> (9) l'approbation de la transaction par des tribunaux d'autres provinces/territoires.[30]

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28 2018 QCCA 305, para 74.

29 Y. LAUZON, in L. CHAMBERLAND, J.-F. ROBERGE et al., *Le Grand collectif : Code de procédure civile : Commentaires et annotations,* 2nd ed., Éditions Yvon Blais, 2017, p. 2567-2568.

30 *Communication Méga-Sat inc.* v. *LG Philips LCD Co. Ltd.*, 2013 QCCS 5563, adopting the dictum from the Ontario case of *Dabbs* v. *SunLife Assurance Co. of Canada*, [1998] O.J. nº 1598 (Gen. Div.).

[91] The various factors do not always carry the same weight and must be adapted to the particulars of each case.[31]

[92] The Court must be mindful that a settlement agreement is a compromise putting an end to a legal dispute, a resolution that the legislator favours in order to preserve the efficiency of the judicial system.[32]

C.4 Analysis and Decision

[93] That the QSA is basically modelled on the U.S. Settlement Agreement is a positive feature. This indicates that the parties intended to strike a bargain that would withstand reasonable comparisons.

[94] However, there is no requirement that a settlement agreement be more advantageous to one party or at least as advantageous, when compared to another similar agreement.

[95] The MDL case that came before Justice Gottschall was obviously a complex one, with multiple stakeholders and important interests to be determined.

[96] This Court has very little information about the level of bargaining power each participant brought to the U.S. bargaining table.

[97] That the QSA is at times more or less generous to the class members than the U.S. Settlement Agreement may be relevant and require explanation, but is certainly not decisive.

[98] This Court accepts that the QSA was articulated in order to resolve some of the issues arising while the U.S. Settlement Agreement was being implemented.

[99] The three options of compensation stipulated in the QSA cover the various forms of damage alleged on behalf of the class members.[33]

[100] It is not demonstrated that the take-up rate to be expected (even a high rate) will likely cause an oversubscription of the Cash Fund or of the Rebate Fund.

[101] The Court is alert to the fact that the QSA (and the Alberta Settlement Agreement) were signed quickly after the negotiations between the Intervenors and Navistar broke down in the N&C case. But this does not in itself prove collusion. It is just as plausible that the signatories of the QSA realized that too much time had run, while unduly awaiting developments in the British Columbia class action.

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31 *Halfon* v. *Moose International Inc.*, 2017 QCCS 4300.
32 *Kosko* v. *Bijimine*, 2006 QCCA 671; Preliminary provision of the *Code of Civil Procedure.*
33 Para 72 of the Motion to Authorize the Bringing of a Class Action.

[102] Indeed, there are potentially many valid reasons why Consumer Law Group and Navistar may have determined that the time was ripe to settle the Québec class action. All the reasons may not coincide strictly with the interests of the members, but it is usually the case when the class representative and class counsel decide to accept the latest offer by a defendant.

[103] The principal of 4037308 Canada inc., Mr. Amirzaman, signed the Settlement Agreement of May 8, 2021.

[104] The Rebate Option provides the class members with a form of "coupon settlement" (meaning that the member must contract further with the defendant to benefit from the indemnity).

[105] As elsewhere, Québec courts review the situation carefully before approving a coupon settlement.[34]

[106] Regarding the QSA, this Court considers that the amount available to a member under the Rebate Option is sufficient to provide significant value. The Court also considers that it is not the only outcome of the class action, and that every member is free to choose the cash option instead (even though the latter may turn out being less advantageous).

[107] There was only one opt-out by a member of the class.[35] The only objection to the QSA came from the Intervenors.

[108] The Court considers the time has come, seven years after the initial application was filed in November 2014, to provide the members of the class with tangible compensation that is reasonable, fair and appropriate in the circumstances.

[109] The Court approves the QSA as being in the best interest of the class members.

[110] The Court will now turn to the claims process to ensure that it is adequate, user-friendly and efficient.

D. APPROVAL OF THE CLAIMS PROCESS

D.1 Main Features of the Claims Process

[111] Article 7 of the QSA sets out the dissemination plan to notify the class members once this judgment is delivered.

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[34] *Abihsira* v. *Johnston*, 2019 QCCA 657; *Abihsira* v. *Stubhub inc.*, 2019 QCCS 5659.
[35] Mr. Éric Larochelle, on August 2, 2021.

[112] The QSA also provides the contents of:

- a Second Long Form Class Notice;[36]
- a Second Short Form Notice;[37]
- a Claim Form;[38]

both in French and in English

[113] The Settlement Websites to be managed by the Settlement Administrator[39] (www.maxxforcesettlement.ca and www.reglementmaxxforce.ca) are to contain an interactive portal to be pre-populated with the known VINS (Vehicle Identification Numbers) of the vehicles involved. This user-friendly feature is meant to facilitate the claims process and to reduce the risk of entry errors.

[114] The drafts appended to the QSA are acceptable and are approved.

[115] The dissemination plan shall be completed by February 28, 2022 at latest.

[116] Under Section 8.03 (2) of the QSA, a claim for monetary compensation must be filed by 180 days after February 28, 2022, being August 27, 2022.

E. APPROVAL OF CLASS COUNSEL FEES AND DISBURSEMENTS

[117] In accordance with the QSA (including the Modification Agreement of September 14 and 15, 2021), Consumer Law Group seeks approval and payment of an amount of $790,600.50 plus applicable taxes in fees, plus disbursements of $3,265.39.

[118] The fees correspond to 25% of the combined value of both the Cash Fund and the Rebate Fund.

[119] The fees sought are less than the ones provided in the Mandate Agreement signed by class representative Amirzaman, being the greater of:

- either, 30% of the total amount received, including interest, from any source whatsoever, whether by settlement or by judgment;
- or the total number of hours worked, at hourly rates ranging between $375 and $775, multiplied by a multiplier of 3.5.

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36 Exhibit 6.
37 Exhibit 5
38 Exhibit 7.
39 RicePoint Administrator, appointed provisionally by the judgment of June 22, 2021 and to be appointed for the further administration of the QSA

[120] Under the latter formula, the fees would be:

$794,068.80[40] X 3.5 = $2,779,240.80

E.1 Legal Principles Applicable to Approval of Class Counsel Fees

[121] Regardless of the contractual arrangements between class representative and class counsel, the Court must always verify that the fees of class counsel are reasonable.[41]

[122] The Court will reduce them when they are exaggerated.[42]

[123] Various factors must be weighed, among them:

(a) the experience of counsel;

(b) the time and effort required and devoted to the matter;

(c) the difficulty of the matter;

(d) the importance of the matter to the client;

(e) the responsibility assumed;

(f) the performance of unusual professional services or professional services requiring special skills or exceptional speed;

(g) the result obtained;

(h) the fees prescribed by statute or regulation; and

(i) the disbursements, fees, commissions, rebates, costs or other benefits that are or will be paid by a third party with respect to the mandate the client gave him.[43]

[124] The fee arrangement negotiated with the class representative benefits from a rebuttable presumption of fairness and reasonableness.[44] Yet the Court must exercise its

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40 For a total of 1 312.25 hours, or an average of $605.12 per hour.

41 Art. 590 C.C.P.; *Option consommateurs* v. *Banque Amex du* Canada, 2018 QCCA 305; *Mahmoud* v. *Société des casinos du Québec inc.*, 2018 QCCS 4526; *Guilbert* v. *Sony BMG Musique (Canada) inc.*, 2007 QCCS 432, conf. 2009 QCCA 231.

42 *Apple Canada Inc.* v. *St-Germain*, 2010 1376.

43 Section 102 of the *Code of Professional Conduct of Lawyers,* CQLR, c. B-1, r. 3.1, as approved by the Court of Appeal in *Option consommateurs* v. *Banque Amex du Canada,* 2018 QCCA 305.

44 *Dupuis* v. *Polyone Canada inc.*, 2016 QCCS 2561.

discretion wisely.[45] The judge who has case managed is in a privileged position to assess the work performed by class counsel.[46]

E.2 Analysis and Decision

[125] This Court considers that the work carried out a class counsel in this matter justifies fees in the low end of the spectrum.

[126] The Québec class action is an obvious copycat of the U.S. class action.

[127] After the application for authorization was drafted and filed, Consumer Law Group carried out very limited activity related specifically to the Québec matter. Only an Application for Authorization to Adduce Evidence led to the examination on discovery of Mr. Amirzaman.[47]

[128] Consumer Law Group obviously awaited the outcome of the U.S. class action.

[129] And whether or not Consumer Law Group was part of the consortium agreement, it also awaited an outcome in the British Columbia class action.

[130] Consumer Law Group failed to keep the case management judges in Québec abreast of what was happening (or not happening) in those parallel cases.

[131] The nature of the work carried out does not justify the steep hourly rates claimed by class counsel.

[132] This Court recognizes that the result achieved is significant and that expertise was required to properly close the QSA.

[133] Considering all the circumstances and applicable factors, this Court considers that fees set at $632,480.40 (20% of the value of the combined Cash Fund and Rebate Fund) are fair and appropriate remuneration of class counsel. Applicable taxes and disbursements of $3,265.39 must be added.

FOR THESE REASONS, THE COURT:	**POUR CES MOTIFS, LE TRIBUNAL :**
[134] **DISMISSES** the Application to Intervene of N&C Transportation Ltd., Farris LLP, Foreman & Company Professional Corporation and Rochon Genova LLP, with judicial costs in favour of Plaintiff and Defendants;	**REJETTE** la demande d'intervention de N&C Transportation Ltd., Farris LLP, Foreman & Company Professional Corporation et Rochon Genova LLP, avec frais de justice en faveur du demandeur et des défendeurs;

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45 *Jacques* v. *189346 Canada inc. Pétroles Therrien inc.*, 2017 QCCS 4020.
46 *Option consommateurs* v. *Banque Amex du Canada*, 2018 QCCA 305.
47 On June 5, 2017.

[135] **ORDERS** that, except as otherwise specified in, or as modified by this judgment, capitalized terms used herein shall have the meaning ascribed in the Settlement Agreement;

ORDONNE que, sauf indication contraire ou modification par le présent jugement, les termes en majuscules utilisés dans le présent document (en anglais) ont la signification qui leur est attribuée dans l'Entente de Règlement;

[136] **DECLARES** that the Settlement Agreement (including its Preamble, its Exhibits and its Modification):

(a) is valid, fair, reasonable and in the best interest of the Class Members;

(b) is hereby approved pursuant to article 590 of the *Code of Civil Procedure*; and

(c) shall be implemented in accordance with all of its terms;

DÉCLARE que l'Entente de Règlement (incluant son préambule, ses pièces et sa modification) :

a) est valide, juste, raisonnable et dans le meilleur intérêt des membres du groupe;

b) est par le présent approuvé conformément à l'article 590 du *Code procédure civile;* et

c) sera mise en œuvre conformément à tous ses termes;

[137] **DECLARES** that the Settlement Agreement constitutes a transaction within the meaning of articles 2361 and following of the *Civil Code of Québec* and that this judgment and the Settlement Agreement are binding on all parties and all Class Members who have not excluded themselves in a timely manner;

DÉCLARE que l'Entente de Règlement constitue une transaction au sens des articles 2631 et suivant du *Code Civil du Québec* et que ce jugement ainsi que l'Entente de Règlement lient toutes les parties et tous les membres du groupe qui ne se sont pas exclus en temps utile;

[138] **DECLARES** that all Class Members, unless they opted out prior to October 1, 2021, are deemed to have elected to participate in the Settlement and shall be bound by the Settlement Agreement and this judgment;

DÉCLARE que tous les membres du groupe, sauf s'ils se sont exclus avant le 1er octobre 2021, sont réputés avoir choisi de participer au règlement et seront liés par l'Entente de Règlement et le présent jugement;

[139] **ORDERS** that the settlement consideration set forth in the Settlement Agreement shall be provided in full satisfaction of the obligations of the Defendants under the Settlement Agreement;

ORDONNE que la considération du règlement énoncée dans l'Entente de Règlement soit fournie en pleine satisfaction des obligations des défenderesses en vertu de l'Entente de Règlement;

[140] **APPROVES** the form, content and mode of dissemination of the Second Class Notice, in its French and English versions, substantially in conformity with

APPROUVE la forme, le contenu et le mode de diffusion du deuxième Avis d'approbation dans ses versions française et anglaise, essentiellement en conformité

Exhibits 5 and 6 of the Settlement Agreement (i.e. the short and long versions);

avec les pièces 5 et 6 de l'Entente de Règlement (c'est-à-dire les versions courte et longue);

[141] **STIPULATES** that the dissemination plan for the notices to class members must be fully executed prior to February 28, 2022;

PRÉCISE que le plan de dissémination des avis aux membres doit être complètement exécuté au plus tard le 28 février 2022;

[142] **APPROVES** the form and content of the Claim Form, as Exhibit 7 to the Settlement Agreement;

APPROUVE la forme et le contenu du formulaire de réclamation tel que prévu à la pièce 7 à l'Entente de Règlement;

[143] **STIPULATES** that the period during which a class member may claim an indemnity shall end on August 27, 2022;

PRÉCISE que le délai pour qu'un membre puisse réclamer indemnisation prendra fin le 27 août 2022;

[144] **APPOINTS** RicePoint Administration Inc. as the Claims Administrator for the purposes of accomplishing the tasks that devolve to it pursuant to the Settlement Agreement;

NOMME RicePoint Administration Inc. à titre d'administrateur des réclamations afin d'accomplir les tâches qui lui sont dévolues en vertu de l'Entente de Règlement;

[145] **APPROVES** the payment of Class Counsel of its extrajudicial fees and disbursements of $636,105.59 plus applicable taxes;

APPROUVE le paiement aux procureurs du groupe de leurs honoraires extrajudiciaires et des débours de 636 105,59 $ plus les taxes applicables;

[146] **ORDERS** that the levies for the *Fonds d'aide aux actions collectives* as provided for in the Settlement Agreement be remitted according to the *Act respecting the Fonds d'aide aux actions collectives* and the *Regulation respecting the percentage withheld by the Fonds d'aide aux actions collectives;*

ORDONNE que les prélèvements du Fonds d'aide aux actions collectives prévus à l'Entente de Règlement soient remis conformément à la *Loi sur le fonds d'aide aux actions collectives* et le *Règlement sur le pourcentage prélevé par le Fonds d'aide aux action collectives;*

[147] **TAKES ACT** of the Claim Administrator's undertaking to produce a report on the administration of the settlement funds, pursuant to section 59 of the *Regulation of the Superior Court of Québec in civil matters*, and to give notice thereof to the Court and to the *Fonds d'aide aux actions collectives;*

PREND ACTE de l'engagement de l'administrateur des réclamations à produire un rapport sur l'administration des fonds de règlement, conformément à l'article 59 du *Règlement de la Cour supérieure du Québec en matière civile*, et d'en donner avis au Tribunal et au Fonds d'aide aux actions collectives;

[148] **THE WHOLE**, without legal costs between Representative Plaintiff and Defendant.

SANS FRAIS de justice entre le demandeur et les défenderesses.

PIERRE-C. GAGNON, j.s.c.

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Date of hearing: October 20, 2021