COURT OF APPEAL

CANADA
PROVINCE OF QUEBEC
REGISTRY OF MONTREAL

No.: 500-09-029937-224
(500-06-000720-140)

MINUTES OF HEARING

DATE: August 5, 2022

CORAM: THE HONOURABLE BENOÎT MOORE, J.A.
GUY COURNOYER, J.A.
CHRISTINE BAUDOUIN, J.A.

APPELLANTS	COUNSEL
N&C TRANSPORTATION LTD. **FARRIS LLP** **FOREMAN & COMPANY PROFESSIONAL CORPORATION** **ROCHON GENOVA LLP**	Mtre BOGDAN-ALEXANDRU DOBROTA (*Woods*) Absent
RESPONDENTS	COUNSEL
4037308 CANADA INC.	Mtre JEFFREY ORENSTEIN Mtre ANDREA GRASS (*Consumer Law Group*) Absent
NAVISTAR CANADA INC. **NAVISTAR, INC.** **NAVISTAR INTERNATIONAL CORPORATION**	Mtre SAMUEL LEPAGE Mtre JEAN LORTIE Mtre LAURENCE ANGERS-ROUTHIER (*McCarthy Tétrault*) Absent

On appeal from a judgment rendered on January 20, 2022 by the Honourable Mr. Justice Pierre-C. Gagnon of the Superior Court, District of Montreal.

NATURE OF THE APPEAL: **Class action – Dismissed application for intervention.**

Clerk at the hearing: Ariane Simard-Trudel	Courtroom: Pierre-Basile-Mignault

HEARING

9:31 Commencement of the hearing.

Continuation of the hearing held on August 2, 2022. The parties were excused from appearing in Court.

PAR LA COUR : Arrêt unanime – voir page 4

Conclusion of the hearing.

Ariane Simard-Trudel, Clerk at the hearing

JUDGMENT

[1] A class action alleging design defects in the emissions system affecting the engines of the trucks manufactured and sold by respondents Navistar Canada Inc., Navistar, Inc. and Navistar International Corporation (collectively, "the Navistar entities") was filed in November 2014.

[2] Similar class actions were filed in British Columbia, Alberta, Manitoba and Ontario.

[3] On June 22, 2021, the Superior Court authorized the bringing of the class action for settlement purposes only and approved the content of the notices to be sent to the members of the class action.[1]

[4] On January 20, 2022, the Superior Court approved a settlement agreement in the class action.[2]

[5] The appeal arises from the dismissal the same day of a tardy application to intervene filed on October 15, 2021 by the British Columbia class representatives and their counsel as separate parties.

[6] The appellants argue that the appeal "raises for the first time the question as to whether an out-of-province representative of a proposed national class that includes Québec residents can intervene at settlement approval to protect the rights of absent Québec members and that it also brings under appellate scrutiny a novel and improper settlement tactic, the *reverse auction* settlement".

[7] Further, they argue that the judge "abdicated his role as guardian of the absent class members' interests and ratified a reverse auction concluded in breach of class counsel's duties of cooperation and transparency and in violation of public order".

[8] In their view, the intervention sought was "essential to ameliorate the adversarial void that affected all stages of the present settlement approval proceedings and to allow the Court to protect the interests of absent Québec class members". They also assert that the judge disregarded "the deficient and confusing information provided to Québec residents and [made] light of the improper settlement tactics deployed by Respondents to undermine the national litigation efforts against the Navistar entities".

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1 *4037308 Canada inc. v. Navistar Canada*, 2021 QCCS 2621.
2 *4037308 Canada inc. v. Navistar Canada*, 2022 QCCS 110.

[9] They ultimately contend that the precedent set by the judgment dismissing their application to intervene "could bar future interventions of national class representatives in Québec and transform this Province in a haven for similar reverse auction settlements".

[10] The unfolding of the proceedings was thoroughly canvassed by the settlement approval judge in his judgment and we find no need to add to his review.

[11] We only hasten to add that the record does not support the appellants' submissions that counsel for the plaintiff and the defendants failed in their duty of candour towards the judge in informing him of the state of the British Columbia class action proceedings during the hearing on June 18, 2021.

[12] Further, the appellants' contention that the lateness of their application to intervene is explained by the fact that the parties kept them in the dark regarding the revival of the Quebec class action proceedings is not substantiated. At least one of the appellant's counsel was clearly aware, as of mid-March 2021, of the intention of Quebec counsel for the plaintiff to revive the Quebec class action.

[13] Ultimately, the appellants acknowledge that they were made aware in early July 2021 of the Superior Court judgment rendered on June 22, 2021, authorizing the bringing of a class action for settlement purposes only and approving the content of the notices to be sent to the members of the class. Yet, the appellants wrote to the judge only on October 13, 2021, to inform him of their intention to intervene, and they filed their application on October 15, 2021.

[14] On October 20, 2021, the judge heard the appellants on both the application to intervene and the settlement approval. Therefore, he was well aware of all the concerns expressed by the appellants regarding the settlement.

[15] In his decision, the judge dismissed the intervention and approved the settlement.

[16] Firstly, the judge concluded that the appellants "brought forward a carriage motion in a flimsy disguise"[3] and, relying on art. 577 *C.C.P.,* he stated that "Québec courts cannot postulate that Québec-only class actions must cede precedence to class actions with a larger membership base".[4]

[17] Secondly, he declined to rule on whether plaintiff's counsel had reneged on a consortium agreement.[5]

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3 *4037308 Canada inc. c. Navistar Canada*, 2022 QCCS 110, para. 54.
4 *Id.*, para. 58.
5 *Id.*, para. 59-60.

[18] Thirdly, he concluded that plaintiff's counsel were in a better position to protect the Quebec members[6] and that he should base his decision on facts "not on masterplans that may not be achieved for many months, if ever".[7]

[19] Fourthly, the judge determined that the intervention could not be qualified as either an aggressive or a conservatory one. He referred to *Abihsira v. Johnston*[8] as supporting an intervention by a third party as a friend of the court, but found that the appellants did not qualify as such. More importantly, he concluded that the appellants were late in filing their application, that they failed to keep themselves abreast of the proceedings[9] and that they "failed throughout to display any serious concern for the best interests of Québec-based members".[10]

[20] Fifthly, he determined that "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".[11]

[21] The issue here is not whether the appellants can intervene in theory, but whether the judge wrongly exercised his discretion to deny the appellant's intervention at this late stage of the proceedings.

[22] In our view, in the particular context of this case, it is unnecessary to rule on whether the judge mischaracterized the nature of the intervention sought or its legal basis.

[23] A decision on intervention is entitled to considerable deference.[12] The factual findings of the judge regarding the intervention do not show any palpable and overriding errors. They support the dismissal of the intervention no matter what the specific legal basis for the intervention was and are therefore beyond the scope of appellate intervention.

[24] With respect to the infringement of the appellants' right to be heard on the existence of a British Columbia practice rule which prevented them from communicating directly with the judge in order to gain access to the court record, even assuming that the judge committed an error—which we do not find to be the case—such an error would be nothing more than harmless and would not be determinative in the overall context of the case. The appellants were heard at length regarding the delay in filing their application to intervene. The judge's findings of fact in general, and in particular at paragraphs 71 and 72, fully refute their submissions.

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6 *4037308 Canada inc. c. Navistar Canada*, 2022 QCCS 110, para. 61.
7 *Id.*, para. 64.
8 *Abihsira c. Johnston*, 2019 QCCA 657.
9 *4037308 Canada inc. c. Navistar Canada*, 2022 QCCS 110, para. 71.
10 *Id.*, para. 72.
11 *Id.*, para. 73.
12 *Abihsira c. Johnston*, 2019 QCCA 657, para. 57.

[25] Finally, we note that the judge did what he was called upon to do, applying the appropriate legal standard, to which he referred.[13] He weighed the proposed settlement, compared it with a similar U.S. settlement[14], considered the risk of collusion[15] and contrasted the proposed settlement against an uncertain future one. He undertook the required clear-eyed analysis and concluded that the settlement agreement was reasonable, fair, appropriate and in the best interest of the class members.

[26] Had we concluded otherwise on the intervention, we would have found no basis to intervene on the approval of the settlement.

FOR THESE REASONS, THE COURT:

[27] **DISMISSES** the appeal, with costs.

BENOÎT MOORE, J.A.

GUY COURNOYER, J.A.

CHRISTINE BAUDOUIN, J.A.

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13 *4037308 Canada inc. c. Navistar Canada*, 2022 QCCS 110, paras. 87-92.

14 *Id.*, paras. 82-86 and paras. 93-98.

15 *Id.*, paras. 101-102.