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June 4, 2013

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Process Server

Attn: John C. Field and Lauri A. Ressor

Re: Baker and Lucier v. Navistar Canada Inc.
Notice of Appeal

Please find enclosed a true copy of the Notice of Appeal of Ms. Baker and Mr. Lucier with respect to the decision of His Honour Justice Gates. This is served pursuant to the *Courts of Justice Act* and the *Rules of Civil Procedure.*

Please contact me with any further concerns.

Yours truly,

LEWIS GOTTHEIL
Counsel, CAW-Canada

LG/le/cope343
Enclosures

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Court File No.:

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

CATHY BAKER AND JOE LUCIER

Plaintiffs
(Appellants)

- and -

NAVISTAR CANADA INC.

Defendant
(Respondent)

Proceeding Under the *Class Proceedings Act, 1992*

APPELLANTS' CERTIFICATE

The Appellants certify that the following evidence is required for the appeal, in the Appellants' opinion:

1. Exhibits - nil
2. The affidavit evidence of Simon Mortimer, sworn September 21, 2012; Ken Claes, sworn October 3, 2012; Wendy White, sworn October 4, 2012; and Simon Mortimer, sworn October 11, 2012
3. The oral evidence of - nil

June 4, 2013

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Court File No.

Cathy Baker and Joe Lucier	and	Navistar Canada, Inc.
Plaintiffs (Appellants)		Defendant (Respondent)

COURT OF APPEAL FOR ONTARIO

Proceeding commenced at Chatham, Ontario

Appellants' Certificate

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Court File No.:

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

CATHY BAKER AND JOE LUCIER

Plaintiffs
(Appellants)

- and -

NAVISTAR CANADA INC.

Defendant
(Respondent)

Proceeding Under the *Class Proceedings Act, 1992*

NOTICE OF APPEAL

THE PLAINTIFFS APPEAL to the Court of Appeal from the Order of His Honour Justice Richard Gates, dated May 9, 2013 made at Chatham, Ontario.

THE APPELLANTS ASK that the Order be set aside and a judgment be granted as follows: that the motion of the Defendant to strike out the Plaintiffs' Amended Statement of Claim, be dismissed, with costs.

THE GROUNDS OF APPEAL are as follows:

PART I – The Test

1. The standard of review with respect to an appeal of a Motion Judge's order striking out a claim under Rule 21 is correctness.

PART II – The Context

2. The CAW-Canada and its Locals 127 and 35 ("the Union") were parties to two collective agreements with the Defendant.

3. The collective agreements, and the statutory freeze that might have extended them, expired on June 29, 2009.

4. The Plaintiffs were employees of the Defendant before and after June 29, 2009, until July 28, 2011, when the Defendant's facility in Chatham closed, and the Plaintiffs were terminated.

5. No strike or lockout occurred during the lawful strike/lockout period following June 29, 2009.

6. Between June 30, 2009, and July 28, 2011, the Defendant took no steps to end or change the terms of the employment relationship between it and the Plaintiffs and the class of employees they seek to represent. One of the terms of that relationship included a promise to pay a permanent job loss or retirement allowance upon closure of the Defendant's facility in Chatham.

PART III – The Motion Judge's Errors in Dismissing the Claim

7. The Motions Judge erred in three distinct ways.

8. The Motions Judge erred when he dismissed, under Rule 21.01, the Plaintiffs' claim for severance pay. It is not plain and obvious that a claim for severance pay in these circumstances is bound to fail.

9. The Plaintiffs each had more than five years' service with the Defendant, as of July 28, 2011. The Plaintiffs were terminated at the same time as hundreds of other employees.

10. The Plaintiffs have a prima facie entitlement to severance pay pursuant to sections 63-67 of the *Employment Standards Act, 2000 S.O. 2000 C.41* as amended ("ESA").

11. Second, the Motions Judge erred when he dismissed the Plaintiffs' claim on behalf of the proposed class, for payment of a retirement or permanent job allowance promised by Letters No. 38 and 66 of the expired production and office collective agreements.

12. In light of the fact that no strike or lockout had occurred at the Defendant's facility after June 29, 2009, and that the Defendant had taken no steps to change or end the terms of the employment relationship between the Defendant and the Plaintiffs and the proposed class, it is not plain and obvious that the claim with respect to the retirement or permanent job allowance provided in letters No. 38 and 66 would fail.

13. Third, the Motions Judge erred when he dismissed the Plaintiffs' claim for compensation in lieu of reasonable notice, in the circumstances of a termination of employment of unionized employees who did not have the benefit of an enforceable right of recall, or just cause protection from termination, as they were not subject to a subsisting collective agreement, nor were they on strike or locked out. This is a novel claim, but not plainly without merit.

14. The absence of an individual contract of employment between the Plaintiffs and the Defendant is not fatal to this claim. It was undisputed that the Plaintiffs and the Defendant had a continuing employment relationship after June 29, 2009. This employment relationship consisted of certain legal rights which the Plaintiffs, as union representatives, should be entitled to assert on behalf of the proposed class, and themselves.

PART IV - Jurisdiction

15. The Motions Judge erred when he failed to find that the jurisdiction of the Superior Court with respect to a claim for severance pay is plainly confirmed by section 8 and section 99 of the ESA, when no collective agreement subsists at the pertinent workplace, and the statutory bargaining freeze has expired.

16. The Motions Judge erred when he failed to confirm that the Superior Court has jurisdiction to enforce a claim regarding a promised retirement or permanent job allowance which extends beyond an expired collective agreement, when the claim crystallizes after the collective agreement has expired. In this circumstance, the grievance arbitration procedure otherwise used in labour relations disputes is unavailable.

17. The Motions Judge erred in finding that the claims of the proposed class members were barred merely because they were represented by a trade union. It is not the presence of a trade union as bargaining agent that bars an action. Here, there was no collective agreement, and the Plaintiffs and proposed class members have no forum except the Court in which to assert all of their claims.

18. The Motions Judge erred when he found that the ongoing duty of the CAW-Canada and its Locals 127 and 35 and the Defendant to bargain in good faith with respect to a closure agreement, and the role of the Ontario Labour Relations Board ("OLRB") in supervising the exercise of that duty, serves to displace the jurisdiction of the Superior Court over the claims. The exclusive bargaining agent status of a trade union does not, in itself, oust the Court's jurisdiction. Where there is a right, such as the right to severance pay or a retirement or permanent job allowance, there is and should be a procedure to enforce that right at law.

The OLRB has no jurisdiction to enforce these rights. The Superior Court of Justice has the jurisdiction.

19. The Union's right to meet with the Defendant employer is **not** a remedy with respect to the employees' right to enforce a guarantee of severance pay, and recover a retirement or permanent job allowance.

20. Only the Court can provide a real remedy with respect to an employer's refusal to make such basic payments, notwithstanding the employer's readiness to meet.

THE BASIS OF THE APPELLATE COURT'S JURISDICTION IS:

a) The Order appealed from is final and struck out the Plaintiffs' claims;

b) Rule 61.04;

c) Section 6, *Courts of Justice Act.* R.S.O. 1990 c. C.43 (as amended)

d) Leave to Appeal is not necessary with respect to a final Order made under Rule 21.01(1)(b) or Rule 21.01(3)(a).

21. The Appellants request that this Appeal be heard at Toronto, Ontario.

June 4, 2013

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Counsel for the Respondent

Court File No.

Cathy Baker and Joe Lucier	and	Navistar Canada, Inc.
Plaintiffs (Appellants)		Defendant (Respondent)

COURT OF APPEAL FOR ONTARIO

Proceeding commenced at Chatham, Ontario

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