

CANADA

PROVINCE OF QUEBEC  
DISTRICT OF MONTREAL

NO: 500-06-001049-200

(Class Action)  
SUPERIOR COURT

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**E. LOMBARD**

*Petitioner*

-vs.-

**EVENFLO COMPANY, INC.**, legal person  
duly constituted, having its head office at 225  
Byers Road, City of Miamisburg, State of  
Ohio, 45342, U.S.A.

and

**GOODBABY CANADA INC.**, legal person  
duly constituted, having its head office at 181  
Bay Street, Suite 4400, BCE Place, Bay  
Wellington Tower, City of Toronto, Province of  
Ontario, M5J 2T3

*Respondents*

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**AMENDED APPLICATION TO AUTHORIZE THE BRINGING OF A CLASS  
ACTION & TO APPOINT THE PETITIONER AS REPRESENTATIVE PLAINTIFF**  
(Art. 574 C.C.P and following)

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## TABLE OF CONTENTS

	Page
<b>I. <u>GENERAL PRESENTATION</u></b> .....	<b>1</b>
A) <u>The Action</u> .....	1
B) <u>The Respondents</u> .....	1
C) <u>The Situation</u> .....	3
I. Side-Impact Collisions .....	3
II. Child Restraints .....	4
III. Canadian Laws, Regulations, and Safety Standards Concerning Booster Seats and Testing Procedures .....	5
IV. The Evenflo Big Kid Booster Seat .....	11
V. Evenflo’s development of a supposed “test” to bolster its marketing and sales .....	14
VI. Evenflo’s Representations Regarding its Big Kid Booster Seat .....	18
VII. The ProPublica Report and the U.S. Congress Investigation into Evenflo’s Conduct .....	20
VIII. Summative Remarks .....	23
<b>II. <u>FACTS GIVING RISE TO AN INDIVIDUAL ACTION BY THE PETITIONER</u></b> .....	<b>24</b>
<b>III. <u>FACTS GIVING RISE TO AN INDIVIDUAL ACTION BY EACH OF THE MEMBERS OF THE CLASS</u></b> .....	<b>25</b>
<b>IV. <u>CONDITIONS REQUIRED TO INSTITUTE A CLASS ACTION</u></b> .....	<b>26</b>
A) The composition of the Class makes it difficult or impracticable to apply the rules for mandates to sue on behalf of others or for consolidation of proceedings .....	26
B) The claims of the members of the Class raise identical, similar or related issues of law or fact .....	26
<b>V. <u>NATURE OF THE ACTION AND CONCLUSIONS SOUGHT</u></b> .....	<b>27</b>
A) Petitioner requests that he be attributed the status of representative of the Class .....	28
B) Petitioner suggests that this class action be exercised before the Superior Court of Justice in the district of Montreal .....	29

TO ONE OF THE HONOURABLE JUSTICES OF THE SUPERIOR COURT, SITTING IN AND FOR THE DISTRICT OF MONTREAL, YOUR PETITIONER STATES AS FOLLOWS:

## I. GENERAL PRESENTATION

### A) The Action

1. The Petitioner wishes to institute a class action on behalf of the following class, of which he is a member, namely:

(...)

- All persons residing in Quebec who have purchased an Evenflo “Big Kid” booster seat or any other group to be determined by the Court;
2. (...) A booster seat is a child safety car seat designed specifically to protect children from injury or death during vehicle collisions by raising the child to ensure that the seatbelt can be correctly adjusted so that it crosses over the middle of the shoulder (collarbone) and over the hips (pelvis). Section 100 (1) of the *Motor Vehicle Restraint Systems and Booster Seats Safety Regulations, SOR/2010-90* defines a booster seat as a removable device designed to be used in a vehicle for seating a person whose mass is at least 18 kg, to ensure that the seat belt assembly fits properly;
  3. The Respondents’ Evenflo Big Kid booster seat was falsely and prominently marketed, advertised, promoted, packaged, labelled, sold, and/or represented as “side impact tested” and safe for children as small as 40 pounds; however, the Respondents’ tests were self-created and entirely unrelated to the actual forces involved in side-impact collisions;
  4. Contrary to the Respondents’ representations, legitimate science and appropriate testing reveals that the Big Kid booster seats provide dubious benefit to children involved in side-impact collisions;
  5. By reason of their actions and omissions, the Respondents induced consumers into purchasing booster seats that do not live up to their reasonable expectations, thereby causing the Petitioner and the members of the Class to suffer *inter alia* economic damages, upon which they are entitled to claim;

### B) The Respondents

6. Respondent Evenflo Company, Inc. (...) is an American corporation with its head office in Miamisburg, Ohio. It is a wholly-owned subsidiary of China-based Goodbaby International Holdings Limited that designs, researches and develops, tests, manufactures, imports/exports, distributes, supplies, markets, advertises, promotes, packages, labels, and sells car seats and other baby and child-related

products. It conducts business throughout Canada, including within the province of Quebec;

7. Evenflo Company, Inc. is the current owner and registrant of the Canadian trademark “EVENFLO” (TMA363284), which was filed on May 19, 1988 and registered on November 10, 1989, the whole as appears more fully from a copy of said trademark from the CIPO database, produced herein as **Exhibit R-1**;

7.1 Respondent Goodbaby Canada Inc. (“Goodbaby”) is a Canadian corporation with its head office in Toronto, Ontario, which, prior to January 23, 2018, was known as Evenflo Canada Inc. It is a wholly-owned subsidiary of Goodbaby International Holdings Limited that designs, researches and develops, tests, manufactures, distributes, markets, advertises, promotes, packages, labels, and sells car seats and other baby and child-related products. Its corporate directors include John Ball, located in the Goodbaby Toronto office and Michael Qu, located in the Evenflo Company, Inc. office in Miamisburg, Ohio. It conducts business throughout Canada, including within the province of Quebec, the whole as appears more fully from a copy of the Corporations Canada entry for Goodbaby Canada Inc. and from a copy of Respondent Evenflo Company, Inc.’s news release entitled “Evenflo to be Acquired by Goodbaby International” dated June 6, 2014, produced herein *en liasse* as **Exhibit R-20**;

7.2 Respondent Goodbaby is registered with Transport Canada to affix the National Safety Mark (NSM) onto the Evenflo Big Kid booster seats (J80) under s. 213.2 of the *Motor Vehicle Restraint Systems and Booster Seats Safety Regulations*, SOR/2010-90, which establishes the Canadian Motor Vehicle Safety Standard (CMVSS) for booster seats, the whole as appears more fully from a copy of Transport Canada’s list of Companies Registered with Transport Canada to affix the National Safety Mark for “CMVSS 213.2 – Booster Seats”, produced herein as **Exhibit R-21**;

8. Respondents Evenflo Company, Inc. and Goodbaby are either directly or indirectly responsible for the design, research and development, testing, manufacture, import/export, distribution, supply, marketing, advertising, promotion, packaging, labelling, and/or sale of the Big Kid booster seats throughout Canada, including within the province of Quebec;

8.1 Given the close ties between the Respondents and considering the preceding, they are solidarily liable for the acts and omissions of the other;

8.2 Unless the situation indicates otherwise, both Respondents will be referred to as “Evenflo” throughout this proceeding;

## C) The Situation

### I. Side-Impact Collisions

9. Side-impact collisions are vehicle crashes where the side of one or more vehicles is impacted. These crashes often occur at intersections, in parking lots, and when two vehicles pass on a multi-lane roadway;
10. In 2017, there were 1,841 motor vehicle fatalities in Canada and 9,960 serious injuries, of these statistics, 32 vehicle fatalities and 131 serious injuries were of children 4 and under, and 43 vehicle fatalities and 303 serious injuries were of children aged 5 to 14 years old. The total number of injuries for all ages was 154,886 and, from this, 2,744 were of the age group 0-4, and 6,514 were between 5 and 14, the whole as appears more fully from a copy of the Transport Canada Canadian Motor Vehicle Traffic Collision Statistics: 2017, produced herein *en liasse* in English and in French as **Exhibit R-2**;
11. Side-impact collisions are a serious automotive injury problem and have been shown to have higher rates of death and serious injury. An occupant on the struck side of a vehicle may sustain far more severe injuries than an otherwise similar front or rear collision crash;
12. Side-impact collisions pose a great risk to children and injury patterns vary across the pediatric age range. In a study conducted by the TraumaLink and the Department of Pediatrics of the Children's Hospital of Philadelphia whereby 93 children in 55 side-impact crashes were studied, 23% of them had received a clinically-significant injury and, of these, head (39%), extremity (22%), and abdominal injuries (17%) were the most common. The cases revealed that serious injuries occur even in minor crashes, the whole as appears more fully from a copy of the Association for the Advancement of Automotive Medicine study entitled "Factors Influencing Pediatric Injury in Side Impact Collisions" dated 2000, with the citation as: Annu Proc Assoc Adv Automot Med. 2000; 44: 407-428, produced herein as **Exhibit R-3**;
13. Though less common than head-on crashes, side-impact collisions are more likely to result in serious harm, including traumatic brain injuries, spinal injuries, and atlanto-occipital dislocation ("AOD"), which occurs when the ligaments attached to the spine are severed. According to a 2015 study, AOD (sometimes referred to as "internal decapitation") is "3 times more common in children than in adults" because, compared to adults, children have proportionally larger heads and laxer ligaments", the whole as appears more fully from a copy of the World Journal of Orthopedics report entitled "Atlanto-occipital dislocation" dated March 18, 2015, with the citation as: World J Orthop 2015 March 18; 6(2): 236-243, produced herein as **Exhibit R-4**;



## II. Child Restraints

14. Although models may vary, there are three established styles, or stages, of car seats or child restraints for kids: rear-facing, forward-facing, and booster:

- (i) Stage 1: A rear-facing seat in which the child is placed with its back to the driver – this is considered the safest position for young kids and it's legally required across Canada for all children from birth until reaching a weight of at least 20 pounds, with most jurisdictions having even more stringent requirements,
- (ii) Stage 2: A forward-facing seat orients the child in the same direction as the rest of the passengers. This type, as with a Stage 1 seat, is equipped with its own five-point harness,
- (iii) Stage 3: A booster seat, which is used in conjunction with the vehicle's built-in seat belt. The purpose of the booster is to ensure that the seat belt follows the correct path — the shoulder strap needs to sit squarely on the child's shoulder, not climbing up onto the neck, and the lap belt should fall low across the hips, not higher onto the torso,

The whole as appears more fully from a copy of the Driving article entitled "Perplexed by child car seats? Here's a look at regulations across Canada" dated January 29, 2020, produced herein as **Exhibit R-5**;

15. These thresholds are important because, according to scientific consensus, booster seats (stage 3) do not adequately protect toddlers. To deliver its full safety benefit in a crash, an adult seat belt must remain on the strong parts of a child's body, i.e. across the middle of the shoulder and the upper thighs. Even if young children are tall enough for a belt to reach their shoulders, they rarely sit upright for long and often wriggle out of position;

16. By contrast, a tightly adjusted five-point harness (stage 2) secures a child's shoulders and hips, and goes between the legs. Harnesses secure children's bodies so that they are less likely to be ejected, and they disperse crash forces over a wider area. This difference is illustrated by the following video stills, which are taken from comparison tests of the Evenflo "SecureKid," a seat that can accommodate a child up to 65 pounds with an internal harness, and the Evenflo Big Kid:

**EVENFLO SECUREKID**  
Harnessed Seat



**EVENFLO BIG KID**  
Belt-Positioning Booster Seat



17. As can be seen above, in the test of the SecureKid, the dummy's head and torso remained entirely within the seat's confines. By contrast, in the test of the Big Kid, the seat belt slipped off the dummy's shoulder, and the dummy's head and torso flailed far outside the seat;
18. Although this latter test "passed" Evenflo's side-impact testing, as will be discussed in more detail hereinbelow, Evenflo's director of manufacturing engineering has previously admitted that it placed the dummy's neck in severe extension, and thus more at risk for injurious head contact;
19. As compared with seat belts, child restraints, when not misused, are associated with a 28% reduction in risk of death adjusting for seating position, vehicle type, model year, driver and passenger ages, and driver survival status, the whole as appears more fully from a copy of the Archives of Pediatrics and Adolescent Medicine study entitled "Effectiveness of child safety seats vs seat belts in reducing risk for death in children in passenger vehicle crashes" dated January 2007, with the citation as 160(6) Arch Pediatr. Adolesc. Med. 617–621 (2006), produced herein as **Exhibit R-6**;

III. Canadian Laws, Regulations, and Safety Standards Concerning Booster Seats

20. Car seat regulations in Canada vary for each of the provinces and territories, the whole as appears more fully from a copy of the Child Passenger Safety Association of Canada document entitled "Appendix A: Provincial and Territorial Legislation Summary" revised April 2019, produced herein as **Exhibit R-7**;
21. As of April 2019, Quebec law requires that children use booster seats until they are 145 cm tall or 9 years of age, provided that their legs are long enough to bend over the edge of the seat. Article 397 of the *Highway Safety Code*, provides:

<p>397. Dans un véhicule routier en mouvement, tout enfant dont la taille est inférieure à 145 cm ou qui est âgé de moins de neuf ans doit être installé dans un ensemble de retenue ou un siège d'appoint conforme aux règlements pris en application de la Loi sur la sécurité automobile (L.C. 1993, c. 16). L'ensemble de retenue et le siège d'appoint doivent, conformément aux instructions du fabricant qui y sont apposées, être adaptés au poids et à la taille de l'enfant et être installés adéquatement dans le véhicule.</p> <p>Toutefois, l'utilisation d'un ensemble de retenue ou du siège d'appoint n'est pas obligatoire:</p> <p>1° pour l'enfant occupant une place assise désignée, au sens des règlements pris en application de la Loi sur la sécurité automobile, que le fabricant du véhicule n'a pas équipée d'une ceinture de sécurité, à la condition qu'aucune place munie d'une ceinture de sécurité ne soit disponible;</p> <p>2° pour l'enfant autorisé par la Société, conformément à l'article 398, à utiliser un ensemble de retenue autre que celui prévu au premier alinéa.</p> <p>À défaut de satisfaire aux conditions du premier alinéa, lorsqu'un enfant occupe un siège dans un taxi ou dans un véhicule de police, il doit être maintenu par la ceinture de sécurité dont est équipé ce siège, sauf dans les cas suivants:</p> <p>1° l'enfant est manifestement incapable de se tenir droit;</p> <p>2° l'enfant est dispensé du port de la ceinture de sécurité ou est autorisé à la</p>	<p>397. In a moving road vehicle, every child who is less than 145 cm tall or under 9 years of age must be restrained by a restraint system or booster seat that complies with the regulations under the <i>Motor Vehicle Safety Act</i> (S.C. 1993, c. 16). The restraint system or booster seat must, in accordance with the manufacturer's instructions affixed thereon, be suitable for the child's height and weight and be securely attached to the vehicle.</p> <p>However, the use of a restraint system or booster seat is not mandatory</p> <p>(1) for a child occupying a designated seating position, within the meaning of the regulations under the <i>Motor Vehicle Safety Act</i>, not equipped with a seat belt by the vehicle manufacturer, provided no place equipped with a seat belt is available; or</p> <p>(2) for a child authorized by the Société, in accordance with section 398, to use a restraint system other than the one prescribed by the first paragraph.</p> <p>If the first paragraph cannot be complied with, a child occupying a seat in a taxi or a police car must be restrained by the seat belt with which the seat is equipped, except in the following cases:</p> <p>(1) the child is clearly unable to maintain an upright position; or</p> <p>(2) the child is exempted from wearing a seat belt or is authorized to partially wear it by the Société pursuant to section 398.</p> <p>This section applies, in addition to public highways, to highways under the</p>
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<p>porter partiellement par la Société conformément à l'article 398.</p> <p>En outre des chemins publics, le présent article s'applique sur les chemins soumis à l'administration du ministère des Ressources naturelles et de la Faune ou entretenus par celui-ci.</p>	<p>administration of or maintained by the Ministère des Ressources naturelles et de la Faune.</p>
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The whole as appears more fully from a copy of an extract from the *Société de l'assurance automobile du Québec* website at <https://saaq.gouv.qc.ca>, produced herein as **Exhibit R-8**;

22. In British Columbia, child car seats are regulated through Division 36 of the *Motor Vehicle Act Regulations*, BC Reg 26/58, in Alberta, child car seats are regulated through Part 5 of the *Vehicle Equipment Regulation*, Alta Reg 122/2009, in Saskatchewan, through ss. 60-63.1 and 248 of *The Vehicle Equipment Regulations*, 1987, RRS c V-2.1 Reg 10, in Manitoba, through *The Highway Traffic Act*, CCSM c H60, in Ontario, through *Seat Belt Assemblies*, RRO 1990, Reg 613 (under *Highway Traffic Act*, R.S.O. 1990, c. H.8), in New Brunswick, through the *Seat Belt Regulation*, NB Reg 83-163 (under the *Motor Vehicle Act*, O.C. 83-893), in Nova Scotia, through the *Seat Belt and Child Restraint System Regulations*, N.S. Reg. 366/2008 (under the *Motor Vehicle Act*, R.S.N.S. 1989, c. 293), in Prince Edward Island, through Part V, s. 92 of the *Highway Traffic Act*, RSPEI 1988, c H-5, in Newfoundland and Labrador, through ss.178 and 178.1 of the *Highway Traffic Act*, RSNL 1990 Chapter H-3, in Nunavut, through the *Seat Belt Assembly and Child Restraint System Regulations*, RRNWT (Nu) 1990 c M-35, in the Northwest Territories, through the *Seat Belt Assembly and Child Restraint System Regulations*, RRNWT 1990 c M-35, and in Yukon, through s. 194 and Part VII, ss. 86-88 of the *Motor Vehicles Act*, SY 2019, c.6;
23. While the laws do vary from province to province, they do share a singular purpose: to prevent injury by ensuring that children are properly, and safely, restrained;
24. Federally, a child may not be placed into a booster seat until s/he is at least 18 kgs (40 pounds) (Exhibit R-5);
25. With regard to the safety testing of booster seats, the Canadian Motor Vehicle Restraint Systems and Booster Seats Safety Regulations, SOR/2010-90 provide:

Normes réglementaires	Prescribed Standards
103 ...	103 ...
NSVAC 213.2	CVMSS 213.2



<p>(3) Les sièges d'appoint doivent être conformes aux normes applicables établies à la partie 4, NSVAC 213.2 — Sièges d'appoint.</p>	<p>(3) Every booster seat must conform to the applicable standards set out in Part 4, CMVSS 213.2 — Booster Seats.</p>
<p>PARTIE 4</p> <p>NSVAC 213.2 — Sièges d'appoint</p> <p>Dispositions générales</p> <p>Interprétation</p> <p>400 Dans la présente partie, <i>Méthode d'essai 213.2</i> s'entend de la <i>Méthode d'essai 213.2 — Sièges d'appoint</i>, dans sa version de mai 2012 publiée par le ministère des Transports.</p> <p>...</p> <p>Essais</p> <p>Essai dynamique</p> <p>407 Lorsqu'il est ajusté à n'importe quelle position de réglage, le siège d'appoint qui est soumis à un essai dynamique conformément à l'article 3 de la <i>Méthode d'essai 213.2</i> :</p> <p>a) ne doit présenter aucune séparation complète d'un élément d'armature porteur ni aucune séparation partielle exposant une surface qui, selon le cas :</p> <p>(i) présente des protubérances de plus de 9,5 mm,</p> <p>(ii) a un rayon de moins de 6,4 mm;</p> <p>b) doit garder, au cours de l'essai, la même position de réglage qu'il avait immédiatement avant le début de l'essai, à l'exception d'un élément du siège d'appoint utilisé pour s'assurer que la ceinture de sécurité du véhicule</p>	<p>PART 4</p> <p>CMVSS 213.2 — Booster Seats</p> <p>General</p> <p>Interpretation</p> <p>400 In this Part, <i>Test Method 213.2</i> means <i>Test Method 213.2 — Booster Seats</i> (May 2012), published by the Department of Transport.</p> <p>...</p> <p>Testing</p> <p>Dynamic testing</p> <p>407 A booster seat that is subjected to a dynamic test in accordance with section 3 of <i>Test Method 213.2</i> must, when in any adjustment position,</p> <p>(a) exhibit no complete separation of any load-bearing structural element, and no partial separation exposing a surface with</p> <p>(i) a protrusion of more than 9.5 mm, or</p> <p>(ii) a radius of less than 6.4 mm;</p> <p>(b) remain in the same adjustment position during the test as it was in immediately before the test began, except a component of the booster seat used to ensure that the vehicle seat belt is adjusted as recommended by the manufacturer;</p> <p>(c) except in the case of a booster seat tested with the anthropomorphic test device specified in subpart S, part 572,</p>



<p>est ajustée conformément aux instructions du fabricant;</p> <p>c) sauf dans le cas d'un siège d'appoint mis à l'essai avec le dispositif anthropomorphe d'essai précisé à la sous-partie S, partie 572, chapitre V, titre 49 du Code of Federal Regulations des États-Unis, dans sa version au 1er octobre 2012, doit limiter à au plus 60 g l'accélération résultante, à l'emplacement de l'accéléromètre installé dans la partie supérieure du thorax du dispositif anthropomorphe d'essai, sauf pour des intervalles ne dépassant pas 3 ms;</p> <p>d) sauf dans le cas d'un siège d'appoint mis à l'essai avec le dispositif anthropomorphe d'essai précisé à la sous-partie S, partie 572, chapitre V, titre 49 du Code of Federal Regulations des États-Unis, dans sa version au 1er octobre 2012, doit limiter à au plus 80 g l'accélération résultante du centre de gravité de la tête du dispositif anthropomorphe d'essai lors du mouvement de celle-ci vers l'avant du véhicule, sauf pour des intervalles ne dépassant pas 3 ms, à moins qu'il ne soit établi que l'accélération résultante au-delà de 80 g est causée par une autre partie du dispositif anthropomorphe d'essai qui entre en contact avec la tête de celui-ci;</p> <p>e) sauf dans le cas d'un siège d'appoint mis à l'essai avec le dispositif anthropomorphe d'essai précisé à la sous-partie S, partie 572, chapitre V, titre 49 du Code of Federal Regulations des États-Unis, dans sa version au 1er octobre 2012, ne doit permettre à aucune partie de la tête du dispositif anthropomorphe d'essai de passer à travers le plan vertical transversal — lequel plan correspond à la limite de</p>	<p>chapter V, title 49 of the <i>Code of Federal Regulations</i> of the United States (revised as of October 1, 2012), limit the resultant acceleration at the location of the accelerometer mounted in the upper thorax of the anthropomorphic test device to not more than 60 g, except for intervals of not more than 3 ms;</p> <p>(d) except in the case of a booster seat tested with the anthropomorphic test device specified in subpart S, part 572, chapter V, title 49 of the <i>Code of Federal Regulations</i> of the United States (revised as of October 1, 2012), limit the resultant acceleration of the centre of gravity of the head of the anthropomorphic test device during the movement of the head towards the front of the vehicle to not more than 80 g, except for intervals of not more than 3 ms, unless it is established that any resultant acceleration above 80 g is caused by another part of the anthropomorphic test device striking its head;</p> <p>(e) except in the case of a booster seat tested with the anthropomorphic test device specified in subpart S, part 572, chapter V, title 49 of the <i>Code of Federal Regulations</i> of the United States (revised as of October 1, 2012), not allow any portion of the head of the anthropomorphic test device to pass through the vertical transverse plane — shown as the forward excursion limit in Figures 5 and 6 of Schedule 7 — that is 813 mm forward of the Z point on the standard seat assembly, measured along the SORL; and</p> <p>(f) except in the case of a booster seat tested with the anthropomorphic test device specified in subpart S, part 572, chapter V, title 49 of the <i>Code of</i></p>
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<p>déplacement avant aux figures 5 et 6 de l'annexe 7 — qui est situé à 813 mm en avant du point Z sur le siège normalisé, mesuré le long de la LROS;</p> <p>f) sauf dans le cas d'un siège d'appoint mis à l'essai avec le dispositif anthropomorphe d'essai précisé à la sous-partie S, partie 572, chapitre V, titre 49 du Code of Federal Regulations des États-Unis, dans sa version au 1er octobre 2012, ne doit permettre à aucun point d'articulation des genoux de passer à travers le plan vertical transversal — lequel plan correspond à la limite de déplacement avant aux figures 5 et 6 de l'annexe 7 — qui est situé à 915 mm en avant du point Z sur le siège normalisé, mesuré le long de la LROS.</p>	<p><i>Federal Regulations</i> of the United States (revised as of October 1, 2012), not allow either knee pivot point to pass through the vertical transverse plane — shown as the forward excursion limit in Figures 5 and 6 of Schedule 7 — that is 915 mm forward of the Z point on the standard seat assembly, measured along the SORL.</p>
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25.1 The anthropomorphic test devices referred to above, commonly referred to as dummies, are mechanical surrogates of the human that are used by the automotive industry to evaluate the occupant protection potential of various types of restraint systems in simulated collisions of new vehicle designs;

26. The Test Method 213.2 – Booster Seats (*Méthode d'essai 213.2 – Sièges d'appoint*) referenced in Part 4 of the *Motor Vehicle Restraint Systems and Booster Seats Safety Regulations*, SOR/2010-90, which were issued by Transport Canada on January 1, 2010 and revised in May 2012, provide *inter alia* the following federal standards for the testing of booster seats and the dummies for a frontal impact:

- That the seat assembly must be mounted on a dynamic test platform that has an accelerometer that is linked to a data processing system;
- That for the dynamic testing, the mass and height range of the anthropomorphic test device (dummy) must match that of the persons for whom the manufacturer recommends the booster seat (under s. 409(1)(e) of the *Motor Vehicle Restraint Systems and Booster Seats Safety Regulations*, SOR/2010-90;
- Regulations on the dummy's clothing in terms of temperature for washing and drying, that it be light-weight cotton, size 12½ sneakers with rubber toe caps, uppers of Dacron and cotton, or nylon and a total mass of 0.453 kg;



- That in terms of testing for a frontal barrier impact, the change in velocity must be 48 km/hr, that the temperature must be between 20.6°C and 22.2°C with humidity of at 10% and not more than 70%;
- Regulations regarding the placement of the booster seat and the dummy;

The whole as appears more fully from a copy of Test Method 213.2 – Booster Seat revised May 2012, produced herein *en liasse* in English and in French as **Exhibit R-9**;

27. Unfortunately, Test Method 213.2 only references testing for frontal barrier impact and not side-impact collisions, although it is quite clear that certain of these standards would apply to testing any type of collision, including side-impact;

27.1 There are no federal regulations for booster seats in side-impact crashes. So Evenflo made up its own test and then passed itself;

28. As a result of this absence, parents and guardians are left to rely on the claims of car seat manufacturers regarding side-impact crashworthiness who are in competition with each other for sales and market share. Among the major players in the child safety seat industry is Evenflo, who designs, researches and develops, tests, manufactures, imports/exports, distributes, supplies, markets, advertises, promotes, packages, labels, and sells a range of juvenile products including car seats, strollers, high chairs, and infant carriers;

#### IV. The Evenflo Big Kid Booster Seat

29. Evenflo launched its Big Kid booster seat in the early 2000s, with the goal of “regaining control in the market” for booster seats from its main competitor, Graco, which had recently released a popular model called the “TurboBooster”, the whole as appears more fully from a copy of the ProPublica article entitled “Evenflo, Maker of the “Big Kid” Booster Seat, Put Profits Over Child Safety” dated February 6, 2020, produced herein as **Exhibit R-10**;

30. At the time of the Big Kid booster seat’s development, Evenflo’s team proposed creating a booster seat with similar features to Graco’s TurboBooster, but priced to sell for about \$10 less. Evenflo sought to develop a product that would sell briskly at large retailers (e.g., Walmart, Canadian Tire, Costco, Babies “R” Us/ Toys “R” Us, Amazon). Evenflo succeeded and within a few years, an internal design review deemed the Big Kid “the reliable workhorse in the Evenflo platform stable” (Exhibit R-10);

31. Despite the Big Kid booster seat’s success, by 2008, Graco was still outselling Evenflo. The marketing department wanted to make the Big Kid look more like the TurboBooster on the shelves of big box retailers. The company felt the Big Kid’s “on-shelf perception” was poor compared with the TurboBooster because Graco’s seat looked like it had more side support (Exhibit R-10);



32. To make its seat look more like Graco's, Evenflo added side wings – curved extensions that protrude from the backrest of the Big Kid booster seat (pictured below). One Evenflo document describing the strategy behind the product launch said the consumer benefits of these new side wings included “increased perceived side protection” (Exhibit R-10):



Big Kid



TurboBooster

33. Consistent with these side wings having no material benefit other than consumer perception and increased profits for the Respondents, Evenflo's own side-impact testing showed no difference in safety between the two models:

### BIG KID BOOSTER SEAT

Model 338 — No Side Wings



### BIG KID BOOSTER SEAT

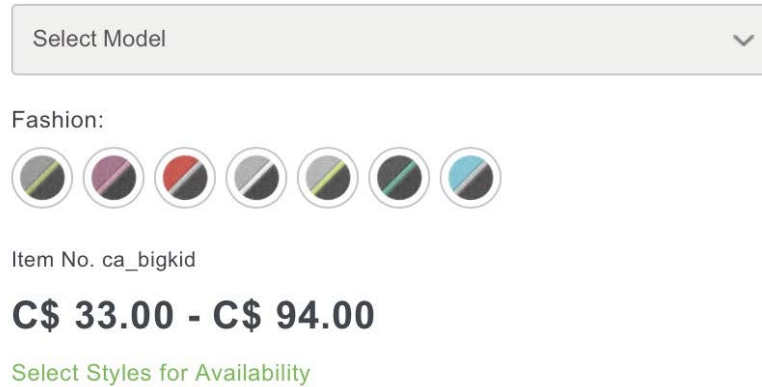
Model 309 — With Side Wings



34. Evenflo offers the Big Kid booster seat in 7 different colour combinations and in 5 different models; Sport, Amp 2-in-1, DLX 2-in-1, LX 2-in-1, and 2-in-1 at a price point of between \$33.00 and \$94.00 as pictured below:

[Car Seats / Booster](#) / Big Kid Booster Car Seat





35. At Canadian Tire, the Big Kid booster seat is sold for \$79.99, at Best Buy for \$74.99, at Walmart for \$74.97, and at Babies “R” Us for \$63.67, the whole as appears more fully from copies of extracts from the retailer websites, produced herein *en liasse* as **Exhibit R-11**;

V. Evenflo’s development of a supposed “test” to bolster its marketing and sales

36. As part of its quest to gain an upper hand on Graco and to enhance the perceived safety of the Big Kid booster seat, Evenflo also began to “test” the side-impact crashworthiness of its new Big Kid booster seat prior to its 2008 release – absent a federal standard, Evenflo made up its own rules (Exhibit R-10);

37. Evenflo developed its own test, then used supposed passing of that test as a means by which to distinguish its new product from the competition in the minds of consumers;

38. Evenflo has represented publicly that its side-impact testing is “rigorous” and analogous to “government” tests. For example, according to a blog post authored by Sarah Haverstick, a “Safety Advocate” and “Child Passenger Safety Technician” at Evenflo, “the engineers at Evenflo have designed the Evenflo Side Impact Test



protocol” as a “rigorous test [that] simulates the government side impact tests conducted for automobiles:

**Side Impact Testing**

Currently, there is no federal standard for side impact testing of car seats and booster seats. However, the engineers at Evenflo have designed the Evenflo Side Impact Test protocol. This rigorous test simulates the government side impact tests conducted for automobiles.

The whole as appears more fully from a copy of an extract from the Facebook page entitled “Making the Transition – How to Choose a Booster Seat” dated April 21, 2015, produced herein as **Exhibit R-12**;

40. This claim is misleading at best. Evenflo’s side-impact test is performed by placing a product on a bench (resembling a car seat), moving that bench at 32 kms per hour (20 miles per hour), then suddenly decelerating it – by contrast the actual federal regulations in Canada for testing frontal barrier impact require a velocity of 48 km per hour under Test Method 213.2 (Exhibit R-9);
41. This difference is not explained in Evenflo’s marketing materials, nor is it explained on Evenflo’s website. To the contrary, a section of Evenflo Company, Inc.’s website entitled “Safety Technology” states the following:

At Evenflo, we continue to go above and beyond government standards to provide car seats that are tested at 2X the Federal Crash Test Standard. We also continually enhance our products with new technologies that distribute crash forces away from your child during a crash.

Some of those technologies include:

...

Side Impact Tested: Meets or exceeds all applicable federal safety standards and Evenflo’s Side impact standards.

The whole as appears more fully from a copy of an extract from (...) Respondent Evenflo Company, Inc.’s website at [www.evenflo.ca](http://www.evenflo.ca), produced herein as **Exhibit R-13**;

42. The same webpage (Exhibit R-12) includes the following descriptions of Evenflo’s side-impact testing:

### Evenflo Side Impact Testing

Evenflo Side impact testing simulates a crash in which the vehicle carrying the car seat is struck on the side by another vehicle. An example of a real life side impact collision is when a car crossing an intersection is struck on the side by another car that ran a stop sign.

### Why is it important to car seat safety?

Approximately one out of four vehicle crashes have a side impact component. According to the National Highway Traffic Safety Administration (NHTSA), impacts to the side of the vehicle rank almost equal to frontal crashes as a source of fatalities and serious injuries to children ages 0 to 12.

### How are car seats tested now?

Federal car seat safety standards require a frontal impact test with a 30 mph velocity change. This approximates the crash forces generated in a collision between a vehicle traveling 60 mph and a parked car of similar mass, or the energy produced in a fall from a three story building. There are currently no provisions in the U.S. and Canadian standards for side impact testing. NHTSA is in the process of developing a child side impact test standard.

### What is the Evenflo Side Impact Testing?

At Evenflo, car seat safety is a top priority. That's why we have created the Evenflo Side Impact test protocol. The Evenflo Side Impact test protocol was developed by Evenflo engineers using state-of-the-art facilities. The rigorous test simulates the energy in the severe 5-star government side impact tests conducted for automobiles.

All Evenflo car seats meet or exceed all applicable federal safety standards and Evenflo's side impact standards.

For car seat safety that you can depend on, trust Evenflo. Shop our collection of side impact tested car seats today.

43. Not only is Evenflo's side-impact test less rigorous than the federal government testing protocol for front crashes, it is, for all intents and purposes, impossible to fail and therefore, completely and utterly meaningless;
44. Records of Evenflo's internal side-impact tests of various models indicate that, following each test, an Evenflo technician answers whether the test showed "dummy retention", meaning, did it stay in the seat or fall on the floor, which is indicated by checking either "yes" or "no" on a form, then sends the report to an engineer who decides whether the Big Kid model passes or fails (Exhibit R-10);
45. In other words, there are only two ways to fail Evenflo's "rigorous" side-impact test: (1) if a child-sized dummy escapes its restraint entirely, and thus ends up on the floor; or (2) the booster seat itself breaks into pieces. The following video still is from a side-impact test "passed" by Evenflo's Big Kid booster seat:



46. The same technician has stated that, in 13 years, he did not once perform a “failed” side-impact test on a booster seat. He also testified that the following images—all of which are from “passed” Evenflo side-impact tests, and use a dummy based on a three-year-old child would have been ticked as “yes” (Exhibit R-10):



47. The above images show the seat belt slipping off the dummy’s shoulders and instead tightening around its abdomen and ribs. This kind of violent movement at

high speed can cause serious damage to a child's internal organs, head, neck and spine, including paralysis and even death;

48. Evenflo was aware of these risks. A safety engineer at Evenflo has admitted under oath that, when real children move in this way, they could suffer catastrophic head, neck and spinal injuries — or die (Exhibit R-10);
49. In other words, the same proprietary side-impact tests deemed successful by Evenflo's engineers plainly demonstrate that Big Kid booster seats place many children at risk of serious injury or death;

#### VI. Evenflo's Representations Regarding its Big Kid Booster Seat

50. In 2008, Evenflo began intentionally misrepresenting the safety of its products to consumers and retailers in order to drive up sales. Evenflo prominently markets the Big Kid booster seat (one of its most popular products) as "side impact tested" and, as safe for children as light as 40 pounds. But these claims are false: Evenflo's own testing demonstrates that the Big Kid booster seat leaves children vulnerable to serious head, neck, and spine injuries in a side-impact crash;
51. On its website, Evenflo Company, Inc. represents the following:

Perfect for your growing child, this seat belt booster combines the peace of mind parents require, with colorful options your child will love.

...

#### Safety Testing

At Evenflo, we continue to go above and beyond government standards to provide car seats that are tested at 2X the Federal Crash Test Standard.

- Side Impact Tested: Meets or exceeds all applicable federal safety standards and Evenflo's side impact standards.
- Designed and tested for structural integrity at energy levels approximately 2X the federal crash test standard.
- FMVSS 213: Federal Motor Vehicle Safety Standards for Child Restraint Systems
- FMVSS 302: Federal Motor Vehicle Safety Standards for Flammability of Interior Materials
- CMVSS 302: Canada Motor Vehicle Safety Standard
- CMVSS 213: Canada Motor Vehicle Safety Standard
- Evenflo Temperature Testing: All current Evenflo car seats are tested for product integrity at both high and low temperatures.



The whole as appears more fully from a copy of an extract from Respondent Evenflo Company, Inc.'s website at www.evenflo.ca dated July 11, 2017, produced herein as **Exhibit R-14**;

52. There are no federal standards for side-impact testing of car seats and booster seats making any claims of doubling that standard nonsensical;
53. On its website and in its marketing, Evenflo tells parents and guardians that its in-house side-impact testing, which it calls the Evenflo Side Impact Test protocol, is "rigorous," simulates realistic conditions, and is equivalent to federal testing, the whole as appears more fully from copies of extracts from (...) Respondent Evenflo Company, Inc.'s website at www.evenflo.ca, produced herein *en liasse* as **Exhibit R-15**;
54. In reality, Evenflo's tests are anything but: videos reveal that when child-sized crash dummies seated in Big Kid booster seats are subjected to the forces of a T-bone collision, they are thrown far out of their shoulder belts;
55. To date, Evenflo continues to prominently advertise its products as "side impact tested," going so far as to stitch a "side impact tested" label into many of its Big Kid booster seats themselves:



56. In other words, by creating a test that has no basis in science or safety and then concluding that its products "pass" this "test", Evenflo is able to aggressively market its Big Kid booster seats as "side-impact tested";
  - 56.1 In the owner's manual for the Big Kid booster seat, Evenflo represents that "By properly using this child restraint and following these instructions (and the instructions that accompany your vehicle), you will greatly reduce the risk of serious injury or death to your child from a crash" and that it was safe for children between 40 to 110 pounds (18 to 49.8 kgs), the whole as appears more fully from a copy of the owner's manual for the Big Kid booster seat en liasse in English and in French, produced herein as **Exhibit R-22**;



57. Evenflo’s misleading and deceptive marketing strategy has been phenomenally successful: since its launch, Evenflo has sold more than 18 million Big Kid booster seats, making the product one of the best-selling models in Canada. It has likely earned hundreds of millions of dollars of profits on these dubious safety products that are, in reality, a mere shadow of what Evenflo claims;
58. Evenflo has now subjected millions of children to the risk of grave injury and death. Meanwhile, it continues to hold itself out to the public as keenly concerned with children’s safety. According to Sarah Haverstick, a “Safety Advocate” and “Child Passenger Safety Technician” at Evenflo, “safety is a word that is embedded into [Evenflo’s] DNA and will always be our number one priority for our customers”, the whole as appears more fully from a copy of the BusinessWire article entitled “Evenflo® Shares Expert Tips for Keeping Children Safe this Summer” dated July 23, 2019, produced herein as **Exhibit R-16**;
59. Had Evenflo disclosed the results of its side-impact testing to the public, no parent or guardian would have purchased a Big Kid booster seat, which does not fulfill its main function – to keep children safe in a vehicle in the event of a collision. Instead, Evenflo kept these tests secret, and embarked on a disinformation campaign aimed at convincing millions that its Big Kid booster seats are safe;

VII. The ProPublica Report and the U.S. Congress Investigation into Evenflo’s Conduct

- 59.1 On February 6, 2020, ProPublica published a report detailing its investigation into Evenflo’s product marketing and testing practices in relation to the Big Kid booster seat (Exhibit R-10);
- 59.2 ProPublica’s investigation showed how the company put marketing over safety in pushing its booster seats as “side impact tested,” even though its own tests showed a child using that seat could be paralyzed or killed in such a crash;
- 59.3 In the course of its investigation, ProPublica had obtained internal videos of Evenflo’s side-impact tests that had been performed on the Big Kid booster seat, internal corporate documents, and depositions that had not previously been made public. As detailed hereinabove, Evenflo’s “tests” showed child-sized dummies thrown violently out of their seat belts with their heads and torsos being thrown far outside the confines of the booster seats. Evenflo’s top car seat engineer admitted in a 2019 deposition that if real children’s bodies moved that way, they could suffer catastrophic injuries and even die; however, Evenflo gave each of its tests passes;
- 59.4 The ProPublica video report on its investigation, describes the 2016 deposition of an Evenflo project engineer who at the time said that parents should not misinterpret the side-impact test labels. David Sandler, then-Associate Director of Project Engineering at Evenflo, attested to the following: “we side-impact test our seats, but I don’t think we say that we offer any type of side-impact protection”, the



whole as appears more fully from a copy of the ProPublica video news report, produced herein as **Exhibit R-23**;

- 59.5 The ProPublica video report (Exhibit R-23) describes a lawsuit that involved a 5-year old girl who had been properly strapped into an Evenflo Big Kid booster seat during a side-impact crash, where she had been sitting opposite the side of impact. She suffered “internal decapitation”; her spinal cord was damaged in the accident leaving her paralyzed from the neck down;
60. In response to ProPublica’s reporting (Exhibit R-10), on February 12, 2020, the United States House of Representatives’ Subcommittee on Economic and Consumer Policy sent a letter to Evenflo Company, Inc.’s CEO requesting documents and information on Evenflo’s Big Kid model booster seats, the whole as appears more fully from a copy of the letter from the Congress of the United States to Evenflo Company, Inc. dated February 12, 2020, from a copy of the U.S. Committee on Oversight and Reform Press Release entitled “Oversight Subcommittee Launches Probe into Car Seat Safety” dated February 12, 2020, and from a copy of the ProPublica report entitled “House Subcommittee Opens Investigation of Evenflo, Maker of “Big Kid” Booster Seats” dated February 12, 2020, produced herein *en liasse* as **Exhibit R-17**;
61. The letter from the U.S. Congress (Exhibit R-17) states the following:

Evenflo has marketed the “Big Kid” seat as safe and “Side Impact Tested.” That safety representation appears to be inconsistent with the video evidence of side impact testing. In fact, your company’s internal tests appear to show that side impacts could put children sitting in the “Big Kid” seat in grave danger.

In order to assist the Subcommittee in its review of this matter, please provide the following information by February 24, 2020, regarding “Big Kid” and other belt-positioning booster seats marketed or sold by Evenflo:

1. All impact test videos, including side-impact test videos; and
2. All documents referring or relating to the following:
  - a. Labeling concerning the age, weight, and height of children for whom the seat is intended, including on marketing materials, packaging, instructional materials, or the seat itself;
  - b. Labeling of safety-related terms, including “Side Impact Tested,” on marketing materials, packaging, instructional materials, or the seat itself;
  - c. Labeling of potential risks, including “Serious Injury or Death,” on marketing materials, packaging, instructional materials, or the seat itself;

- d. Safety and risk standards used by Evenflo in connection with side-impact testing, including what constituted a “passing” result; and
  - e. Actual results and records of impact and other safety testing; and
3. All communications with the U.S. federal agencies referring or relating to safety standards; and
  4. All communications with Canadian regulators relating to any recall.
62. On February 14, 2020, two U.S. Senate members sent a letter to the U.S. National Highway Traffic Safety Administration (NHTSA) – the equivalent to Transport Canada, but in the U.S. – “demanding answers about reported negligence by a booster seat manufacturer [named] Evenflo”, the whole as appears more fully from a copy of the Press Release entitled “Duckworth, Cantwell Demand Answers Following Reports that Major Child Car Seat Manufacturer Lied About Safety Testing and Requirements, Resulting in Fatalities” dated February 14, 2020, produced herein as **Exhibit R-18**;
63. The letter (Exhibit R-18) requested that NHTSA “act swiftly to finalize a long overdue rule establishing effective side impact performance requirements for all child restraint systems” and stated the following:
- There are real world consequences to [NHTSA’s] inaction. For example, ProPublica reported the details of potential negligence of a booster seat manufacturer, Evenflo, in developing and marketing its “Big Kid” booster car seat product that may fail to protect children in side impact crashes, which accounted for an estimated 25 percent of vehicle collision fatalities for children under the age of 15 in 2018.
- Evenflo suggests that their car seat products meet or exceed all applicable Federal safety standards for side impact testing, a claim that appears misleading. Evenflo also asserts that their products meet the company’s own side impact standards. However, alleged videos of side impact testing calls into question the level of protection these standards provide.
64. In addition, the letter (Exhibit R-18) requested responses to the following questions by March 4, 2020:
1. On what date and in what manner did NHTSA first learn about concerns related to the safety performance of Evenflo booster seats in side impact collisions?
  2. Evenflo’s website states that it provides car seats that are “Side Impact Tested: Meets or exceeds all applicable federal safety standards and Evenflo’s Side impact standards.” Please identify which applicable





Federal Motor Vehicle Safety Standard (FMVSS) addressing side impact performance requirements Evenflo is citing, and confirm whether Evenflo consulted with NHTSA in establishing the company's side impact standards.

3. Has Evenflo's "Big Kid" booster car seat ever failed NHTSA compliance testing under FMVSS 213?
4. What actions has, or will, NHTSA take in coordination with the Federal Trade Commission and the Consumer Product Safety Commission to crack down on false and deceptive advertising by makers of child safety seats and booster seats?
5. When will NHTSA publish a final rule creating a Federal Motor Vehicle Safety Standard that establishes effective side impact performance requirements for all child restraint systems?

#### VIII. Summative Remarks

65. Evenflo has spent over a decade maximizing its profits by waging a disinformation campaign against parents and guardians, relentlessly telling them that the Big Kid booster seats are "side-impact tested" and safe for children as small as 40 pounds;
66. Evenflo has apparently done no scientific testing to determine at what height or weigh, if any, it is actually safe to use a Big Kid booster seat. Though Evenflo could have treated its testing as an opportunity to answer this question regarding the safety of its product, consistent with its stated commitment to making safety a "number one priority for our customers", it has yet to actually do so;
67. The Respondents' ongoing practice of designing, researching and developing, testing, manufacturing, importing/exporting, distributing, supplying, marketing, advertising, promoting, packaging, labelling, and/or selling the Big Kid booster seat as "side impact tested" and safe for children as small as 40 pounds – when in fact, the Big Kid booster seat was not subjected to any meaningful tests, nor is safe by any stretch of the word for a child in the event of a collision – is likely to deceive ordinary consumers who reasonably understood that the Big Kid booster seats will protect their children in the event of a side-impact crash. In reliance upon the Respondents' claims, Class Members sought out and purchased the Big Kid booster seat;
68. The advertisements and representations made by the Respondents as set forth above were and are false and/or misleading. The acts and practices of the Respondents, as alleged herein, constitute unfair or deceptive acts or practices and the marking of false statements;
69. As a result of the Respondents' deceptive claims, consumers have purchased products that are substantially different than represented and have unknowingly



- and unwittingly subjected their children or guardians to a serious risk of injury and death;
70. Had Evenflo disclosed the methods and results of its side-impact testing to the public, no responsible parent or guardian would have purchased a Big Kid booster seat. As noted above, these tests demonstrate, unequivocally, that Big Kid booster seats place many children at risk of serious injury or death. Evenflo's engineers have admitted that they knew this;
  71. Through their deceptive practice of designing, researching and developing, testing, manufacturing, importing/exporting, distributing, supplying, marketing, advertising, promoting, packaging, labelling, and/or selling the Big Kid booster seat as "side impact tested" and safe for children as small as 40 pounds despite the lack of any foundation of truth to this, the Respondents have been able to gain significant market share for their Big Kid booster seat by deceiving consumers about the attributes of the Big Kid booster seats and differentiating them from other traditional, comparable booster seats that are actually safe. The Respondents were motivated to mislead consumers for no other reason than to take away market share from competing products, thereby increasing their own profits;
  72. The Petitioner and the other Class Members were among the intended recipients of the Respondents' deceptive representations and omissions described herein. The Respondents' deceptive representations and omissions, as described herein, are material in that a reasonable person would attach importance to such information and would be induced to act upon such information in making purchase decisions;
  73. As a result of Evenflo's failure to disclose the risks associated with using Big Kid booster seat models, as well as its false and misleading claims that these models were "side-impact tested," the Petitioner and Class Members were misled into purchasing these car seats, which they otherwise would not have purchased;
  - 73.1 The Petitioner and the Class Members that he seeks to represent suffered economic damages by purchasing the Evenflo Big Kid Booster Seats; they did not receive the benefit of the bargain and are therefore entitled to damages;
  74. The Respondents must be brought to task for their inexcusable behaviour. Though it will never be able to make amends for untold number of children who have been injured or killed in its misleadingly marketed Big Kid booster seats, Evenflo should, at the very least, be forced to recall each and every Big Kid booster seat still in use and refund its purchase price;

## **II. FACTS GIVING RISE TO AN INDIVIDUAL ACTION BY THE PETITIONER**

75. On March 28, 2018, the Petitioner purchased 3 Evenflo Big Kid booster seats for \$52.49 each, plus sales taxes from Canadian Tire in Saint-Jerome, Quebec for a total cost of \$181.05 and he subsequently installed them into his vehicle to secure his children while driving, the whole as appears more fully from a copy of the



Petitioner's receipt dated March 28, 2018 and from a copy of a printout of the transaction from March 28, 2018, produced herein *en liasse* as **Exhibit R-24**;

76. The Petitioner believed, from having seen the Respondents' marketing and having read the product packaging/ labelling, that the Big Kid booster seat was safe for children weighing 40 to 100 pounds and that it had been rigorously tested, including for side-impact collisions;
77. The Petitioner has recently discovered that these product claims are false and misleading. The Petitioner has also recently discovered that similar class actions were filed in the United States for the Big Kid booster seat alleging that these claims are false, the whole as appears more fully from copies of various U.S. class action complaints, produced herein *en liasse* as **Exhibit R-19**;
78. In consequence, the Petitioner now realizes that he has been misled by the Respondents; had he known the true facts, the Petitioner would not have purchased the Big Kid booster seats and would have instead purchased one of the many safer available alternatives;
79. The Petitioner's damages are a direct and proximate result of the Respondents' conduct and its false and misleading advertising;
80. In consequence of the foregoing, the Petitioner is justified in claiming damages;

### **III. FACTS GIVING RISE TO AN INDIVIDUAL ACTION BY EACH OF THE MEMBERS OF THE CLASS**

81. Every member of the Class has purchased a Big Kid booster seat believing that they were "side-impact tested" and safe for children as small as 40 pounds, due to Respondents' marketing, advertising, promotion, packaging, labelling, and/or representations;
82. The Class Members were, therefore, induced into error by the Respondents' false and misleading advertising;
83. Had the Respondents disclosed the truth about the Big Kid booster seat, consumers would not have purchased them or would not have paid such a high price;
84. In consequence of the foregoing, each member of the Class is justified in claiming at least one or more of the following as damages:
  - a. The purchase price of the Big Kid booster seat(s) or in the alternate, the cost of its replacement;
  - b. Punitive damages;



85. The Respondents engaged in wrongful conduct, while at the same time obtaining, under false pretences, significant sums of money from Class Members;
86. All of these damages to the Class Members are a direct and proximate result of the Respondents' conduct and their false and misleading advertising;

#### **IV. CONDITIONS REQUIRED TO INSTITUTE A CLASS ACTION**

##### **A) The composition of the Class makes it difficult or impracticable to apply the rules for mandates to sue on behalf of others or for consolidation of proceedings**

87. The Petitioner is not privy to the specific number of persons who purchased Big Kid booster seats; however, it is safe to estimate that it is in the tens of thousands (if not hundreds of thousands). Nevertheless, a combination of the Respondents' sales records and third-party merchants like Amazon, Walmart, Canadian Tire, Best Buy, and Babies "R" Us could establish the size of the class to a reasonable degree of exactitude;
88. Class Members are numerous and are scattered across the entire province of Quebec and country;
89. In addition, given the costs and risks inherent in an action before the courts, many people will hesitate to institute an individual action against the Respondents. Even if the Class Members themselves could afford such individual litigation, it would place an unjustifiable burden on the courts and, at the very least, is not in the interests of judicial economy. Furthermore, individual litigation of the factual and legal issues raised by the conduct of the Respondents would increase delay and expense to all parties and to the court system;
90. This class action overcomes the dilemma inherent in an individual action whereby the legal fees alone would deter recovery and thereby in empowering the consumer, it realizes both individual and social justice as well as rectifies the imbalance and restore the parties to parity;
91. Also, a multitude of actions instituted in different (...) judicial districts (...), risks having contradictory judgments on questions of fact and law that are similar or related to all members of the Class;
92. These facts demonstrate that it would be impractical, if not impossible, to contact each and every member of the Class to obtain mandates and to join them together in one action;
93. In these circumstances, a class action is the only appropriate procedure and the only viable means for all of the members of the Class to effectively pursue their respective rights and have access to justice;

##### **B) The claims of the members of the Class raise identical, similar or related issues of law or fact**



94. All consumers were subjected to the same deceptive actions – the Respondents' marketing, advertising, promotion, packaging, labelling, selling, and/or representing of the Big Kid booster seat as suitable and safe for children;
95. Individual issues, if any, pale by comparison to the common issues that are significant to the outcome of the litigation;
96. The damages sustained by the Class Members flow, in each instance, from a common nucleus of operative facts, namely, the Respondents' misconduct;
97. The claims of the members raise identical, similar or related issues of fact or law, namely:
- a) Are the Evenflo Big Kid booster seats unsafe in side-impact crashes?
  - b) Did Evenflo know, or should it have known, that its Evenflo Big Kid booster seats were unsafe in side-impact crashes?
  - c) Did the Respondents engage in unfair, false, misleading, or deceptive acts or practices regarding the manufacturing, marketing, advertising, promoting, packaging, labelling, selling, and/or representing the Evenflo Big Kid booster seats as "side impact tested" and safe for children as small as 40 pounds?
  - d) Did Evenflo actively conceal evidence, including its proprietary test data, demonstrating that its Big Kid booster seat models are unsafe in side-impact crashes?
  - e) Are the Respondents liable to the Class Members for reimbursement of the purchase price of the Evenflo "Big Kid" booster seats as a result of their misconduct?
  - f) Should an injunctive remedy be ordered to requiring the Respondents to (i) recall all Evenflo Big Kid booster seats, (ii) cease selling Big Kid booster seats; and/or (iii) add labeling to all future Big Kid booster seats warning consumers of the dangers associated with their use?
  - g) Are the Respondents responsible to pay punitive damages to Class Members and in what amount?
98. The interests of justice favour that this application be granted in accordance with its conclusions;

#### **V. NATURE OF THE ACTION AND CONCLUSIONS SOUGHT**

99. The action that the Petitioner wishes to institute on behalf of the members of the Class is an action in damages, injunctive relief, and a declaratory judgment;

100. The conclusions that the Petitioner wishes to introduce by way of an application to institute proceedings are:

GRANT the class action of the Petitioner and each of the members of the Class;

DECLARE that the Defendants have committed unfair, false, misleading, and/or deceptive conduct with respect to their manufacturing, marketing, advertising, promoting, packaging, labelling, selling, and/or representing the Evenflo Big Kid booster seats as “side impact tested” and safe for children as small as 40 pounds;

ORDER the Defendants to cease from continuing their unfair, false, misleading, and/or deceptive conduct by manufacturing, marketing, advertising, promoting, packaging, labelling, selling, and/or representing the Evenflo Big Kid booster seats as “side impact tested” and safe for children as small as 40 pounds;

CONDEMN the Defendants to pay to each member of the Class a sum to be determined in compensation of the damages suffered, and ORDER collective recovery of these sums;

CONDEMN the Defendants to pay punitive damages to each of the members of the Class, and ORDER collective recovery of these sums;

CONDEMN the Defendants to pay interest and additional indemnity on the above sums according to law from the date of service of the application to authorize a class action;

ORDER the Defendants to deposit in the office of this Court the totality of the sums which forms part of the collective recovery, with interest and costs;

CONDEMN the Defendants to bear the costs of the present action including expert and notice fees;

RENDER any other order that this Honourable Court shall determine and that is in the interest of the members of the Class;

A) The Petitioner requests that he be designated as representative of the Class

101. The Petitioner is a member of the Class;

102. The Petitioner is ready and available to manage and direct the present action in the interest of the members of the Class that he wishes to represent and is determined to lead the present dossier until a final resolution of the matter, the whole for the benefit of the Class, as well as, to dedicate the time necessary for the present action before the Courts and the *Fonds d'aide aux actions collectives*, as the case may be, and to collaborate with his attorneys;

103. The Petitioner has the capacity and interest to fairly, properly, and adequately protect and represent the interest of the members of the Class;

104. The Petitioner has given the mandate to his attorneys to obtain all relevant information with respect to the present action and intends to keep informed of all developments;
105. The Petitioner, with the assistance of his attorneys, is ready and available to dedicate the time necessary for this action and to collaborate with other members of the Class and to keep them informed;
106. The Petitioner has given instructions to his attorneys to put information about this class action on their website and to collect the coordinates of those Class Members that wish to be kept informed and participate in any resolution of the present matter, the whole as will be shown at the authorization hearing;
107. The Petitioner is in good faith and has instituted this action for the sole goal of having his rights, as well as the rights of other Class Members, recognized and protected so that they may be compensated for the damages that they have suffered as a consequence of the Respondents' conduct;
108. The Petitioner understands the nature of the action;
109. The Petitioner's interests do not conflict with the interests of other Class Members and further, the Petitioner has no interest that is antagonistic to those of other members of the Class;
110. The Petitioner is prepared to be examined out-of-court on his allegations (as may be authorized by the Court) and to be present for Court hearings, as may be required and necessary;
111. The Petitioner has spent time researching this issue on the internet and meeting with his attorneys to prepare this file. In so doing, he is convinced that the problem is widespread;
- B) The Petitioner suggests that this class action be exercised before the Superior Court of Justice in the district of Montreal
112. A great number of the members of the Class reside in the judicial district of Montreal and in the appeal district of Montreal;
113. The Petitioner's attorneys practice their profession in the judicial district of Montreal;
114. The present application is well founded in fact and in law.

**FOR THESE REASONS, MAY IT PLEASE THE COURT:**

**GRANT** the present application;

**AUTHORIZE** the bringing of a class action in the form of an application to institute proceedings in damages, injunctive relief, and declaratory relief;

**APPOINT** the Petitioner as representative of the persons included in the Class herein described as:

(...)

- a. All persons residing in Quebec who have purchased an Evenflo “Big Kid” booster seat or any other group to be determined by the Court;

**IDENTIFY** the principle issues of fact and law to be treated collectively as the following:

- a) Are the Evenflo Big Kid booster seats unsafe in side-impact crashes?
- b) Did Evenflo know, or should it have known, that its Evenflo Big Kid booster seats were unsafe in side-impact crashes?
- c) Did the Respondents engage in unfair, false, misleading, or deceptive acts or practices regarding the manufacturing, marketing, advertising, promoting, packaging, labelling, selling, and/or representing the Evenflo Big Kid booster seats as “side impact tested” and safe for children as small as 40 pounds?
- d) Did Evenflo actively conceal evidence, including its proprietary test data, demonstrating that its Big Kid booster seat models are unsafe in side-impact crashes?
- e) Are the Respondents liable to the Class Members for reimbursement of the purchase price of the Evenflo “Big Kid” booster seats as a result of their misconduct?
- f) Should an injunctive remedy be ordered to requiring the Respondents to (i) recall all Evenflo Big Kid booster seats, (ii) cease selling Big Kid booster seats; and/or (iii) add labeling to all future Big Kid booster seats warning consumers of the dangers associated with their use?
- g) Are the Respondents responsible to pay punitive damages to Class Members and in what amount?

**IDENTIFY** the conclusions sought by the class action to be instituted as being the following:

GRANT the class action of the Petitioner and each of the members of the Class;

DECLARE that the Defendants have committed unfair, false, misleading, and/or deceptive conduct with respect to their manufacturing, marketing, advertising,





promoting, packaging, labelling, selling, and/or representing the Evenflo Big Kid booster seats as “side impact tested” and safe for children as small as 40 pounds;

ORDER the Defendants to cease from continuing their unfair, false, misleading, and/or deceptive conduct by manufacturing, marketing, advertising, promoting, packaging, labelling, selling, and/or representing the Evenflo Big Kid booster seats as “side impact tested” and safe for children as small as 40 pounds;

CONDEMN the Defendants to pay to each member of the Class a sum to be determined in compensation of the damages suffered, and ORDER collective recovery of these sums;

CONDEMN the Defendants to pay punitive damages to each of the members of the Class, and ORDER collective recovery of these sums;

CONDEMN the Defendants to pay interest and additional indemnity on the above sums according to law from the date of service of the application to authorize a class action;

ORDER the Defendants to deposit in the office of this Court the totality of the sums which forms part of the collective recovery, with interest and costs;

CONDEMN the Defendants to bear the costs of the present action including expert and notice fees;

RENDER any other order that this Honourable Court shall determine and that is in the interest of the members of the Class;

**DECLARE** that all members of the Class that have not requested their exclusion, be bound by any judgment to be rendered on the class action to be instituted in the manner provided for by the law;

**FIX** the delay of exclusion at thirty (30) days from the date of the publication of the notice to the Class Members, date upon which the members of the Class that have not exercised their means of exclusion will be bound by any judgment to be rendered herein;

**ORDER** the publication of a notice to the members of the group in accordance with article 579 C.C.P. within sixty (60) days from the judgment to be rendered herein in La Presse, the Montreal Gazette, Le Soleil;

**ORDER** that said notice be available on the Respondents website(s), as well as its Facebook page(s) and Twitter account(s) with a link stating “Notice to Evenflo Big Kid Booster Seat Purchasers”;

**RENDER** any other order that this Honourable Court shall determine and that is in the interest of the members of the Class;

**THE WHOLE** with costs, including all publication and dissemination fees.

Montreal, June 3, 2020

*Andrea Grass*

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