

CANADA

PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL

(Class Action Division)
SUPERIOR COURT

No.: 500-06-000907-184

KARINE LEVY

Plaintiff

vs.

NISSAN CANADA INC.

Defendant

**APPLICATION TO APPROVE A CLASS ACTION SETTLEMENT AND FOR
APPROVAL OF CLASS COUNSEL FEES**

(Article 590 C.C.P. and Article 32 of an Act respecting the Fonds d'aide aux actions collectives, CQLR c. F-3.2.0.1.1.)

TO THE HONORABLE JUSTICE PIERRE NOLLET OF THE SUPERIOR COURT OF QUEBEC, DISTRICT OF MONTREAL, DESIGNATED TO PRESIDE OVER THE PRESENT CLASS ACTION, THE PLAINTIFF RESPECTFULLY SUBMITS THE FOLLOWING:

PART ONE: OVERVIEW OF THIS APPLICATION

1. On September 19, 2019, this Honorable Court authorized in part the Data Incident class action herein, as amended by the April 28, 2021 judgment of the Court of Appeal which expanded the Class and list of common issues (the “**Québec Action**”), as appears from the Court record.
2. On October 29 2019, the Ontario Superior Court of Justice certified a parallel class action against the Defendant, Nissan Canada Inc., as well as Nissan North America Inc. (collectively, “**Nissan**”), in the matter of *Grossman and Arntfield v. Nissan Canada Inc., Nissan Canada Financial Services Inc./Services Financiers Nissan*

Canada Inc. and Nissan North America, Inc., in the Court file No. CV-18-00590402-00CP (the “**Ontario Action**”).

3. On July 27, 2021, Plaintiff filed her Originating Class Action Application, as appears from the Court record.
4. In October 2021, the authorization notices were disseminated as ordered by this Honorable Court.
5. On July 26, 2023, the parties participate in a private mediation presided by the Honorable former Supreme Court of Canada Justice Thomas Cromwell (held in Toronto).
6. The parties continued their negotiations thereafter and were able to sign a confidential memorandum of understanding on August 28, 2023.
7. The parties continued their negotiations for months thereafter, and on or around January 4, 2024, the parties to the Québec Action and the Ontario Action executed a national settlement to definitively settle both actions, as appears more fully from a copy of the Settlement Agreement, including its schedules and French translations (the “**Settlement Agreement**” or “**Proposed Settlement**” or “**Settlement**”) filed herewith as **Exhibit R-1**.¹
8. Except to the extent that they are modified by this Application, capitalized terms used herein have the meanings assigned to them in the Settlement Agreement (Exhibit R-1).

¹ Following the execution of the Settlement Agreement, additional revisions were made by the Parties to the Claim Form (Schedule “B”) and to both the short form and long form of the Pre-Approval Notice (Schedules “D1” and “D-2”). The Settlement Agreement filed as Exhibit R-1 contains these revised and updated versions of the Claim Form and the Pre-Approval Notice. That being said, Exhibit R-1 does not integrate the versions of the Pre-Approval Notices, the Claim Form and the Objection Form that were ultimately approved by this Honorable Court pursuant to its April 26, 2024 Pre-Approval Judgment, mentioned below.

9. The nature of this Application requires Class Counsel to disclose in broad terms its efforts in advancing this litigation, as well as certain discussions regarding the claims, the defences and/or the settlement negotiations. Nothing in this application and associated affidavits are intended to waive, nor should it be construed as a waiver of, attorney-client, litigation or other privilege or confidentiality that may attach to the information outlined herein.

10. The Proposed Settlement is on behalf of the following **Quebec Class**:

All persons in Québec: (i) whose personal or financial information held by Nissan Canada was compromised in a data breach of which Respondent was advised by the perpetrators by email on December 11, 2017, or (ii) who received a letter from Nissan Canada on or about January 2018 informing them of such data breach.

11. On April 24, 2024, the Honorable Justice Glustein of the Ontario Superior Court of Justice rendered and issued the Ontario Approval Order, the whole as more fully appears from the said Ontario Approval Order and endorsement (reasons, both the handwritten version and the transcription of same by the Judge's assistant), copies of which are communicated herewith, *en liasse*, as **Exhibit R-2** (the "**Ontario Approval Order**").

12. As appears from the Ontario Approval Order, the Ontario Superior Court of Justice, *inter alia*:

a) declared the Settlement fair, reasonable and in the best interests of the Settlement Class;

b) approved the Settlement Agreement;

c) approved the Approval Notices and notice plan for the dissemination of the Approval Notices;

d) ordered the payment by Nissan of the costs and fees of the Claims Administrator (including notices costs) in accordance with the Settlement Agreement;

e) approved the form and content of the Claim Form and the Claims Period, and

f) ordered that Class Counsel's fees in the sum of \$816,522.79 plus HST of \$106,147.96 and disbursements of \$95,993.35 for an all-inclusive sum of \$1,018,664.10 are approved as fair and reasonable and to be paid pursuant to the Settlement (these fees being inclusive of the Contribution To Class Counsel Fees payable by Nissan pursuant to the Settlement Agreement).

13. That being said, the Ontario Approval Order specifically mentioned the following at paragraphs 23 and 26, confirming that its Judgment is contingent on this Honorable Court also approving the Settlement of course:

“23. THIS COURT ORDERS that this Order is contingent upon a parallel order being made by the Superior Court of Quebec in the action titled *Karine Levy v. Nissan Canada Inc.*, bearing Superior Court of Quebec Court File No.: 500-06-000907-184;

(...)

26. THIS COURT ORDERS that the terms of this Order shall not be effective unless and until such order mentioned in paragraph 23 above has been made;”

14. In this Application, the Plaintiff respectfully seeks:

(a) on consent of the Defendant, this Honourable Court's approval of the Settlement Agreement;

- (b) this Honourable Court's approval of the Approval Notice in their Short and Long forms, copies of which are communicated herewith as **Exhibit R-3, en liasse** in their English Form (French versions will diligently be prepared and filed before the approval hearing);
- (c) this Honourable Court's approval of the notice plan for the Approval Notices, as set out at Articles 6.2 and 6.3 of the Settlement Agreement; and
- (d) this Honourable Court's approval of Class Counsel Fees as detailed below and pursuant to Article 5 of the Settlement Agreement, plus applicable taxes. As mentioned above, the Ontario Approval Order already approved the Class Counsel Fees and disbursements. That being said, and as already disclosed to the Ontario Court, by agreement between Class Counsel, Ontario Counsel (three law firms) are seeking 75% of the Class Counsel Fees + HST, and the undersigned Quebec Class Counsels are seeking 25% of the Class Counsel Fees + GST and QST, and disbursements (as detailed below).

I. **BACKGROUND**

15. On February 12, 2018, Plaintiff filed her *Application for Authorization to Institute a Class Action* against Defendant, before the Superior Court of Québec, District of Montréal, as appears from the Court record.

16. The Class Action was instituted following the Data Incident that occurred on or about December 11, 2017, when Nissan received an anonymous email from an unknown individual claiming to have information about Nissan customers, and demanding a ransom be paid to return the data.
17. Québec Counsel is working cooperatively with counsel in the Ontario Action such that the Settlement Agreement resolves claims included in both the Ontario Action and the Québec Action. Class Counsel therefore seek separate, but consistent, orders approving the Settlement Agreement from this Honorable Court and the Ontario Superior Court of Justice (which has already been issued, as mentioned above, Exhibit R-2).

PART TWO: TERMS OF THE SETTLEMENT AGREEMENT

18. Following extensive arm's length negotiations, including mediation, the Parties entered into the Settlement Agreement on January 4, 2024, pursuant to which Nissan agreed to pay a total sum of \$2,300,000 as well as to pay for any and all Administration Expenses for the costs of administering the Settlement (which total \$411,742.62, as explained at paragraph 23 below), to settle the Ontario Action and Quebec Action. Together, these amounts represent a total sum of **\$2,721,742.62** (the "**Recovery Amount**").
19. The Settlement creates two (2) capped settlement funds from which the Settlement Class will be compensated, totaling **\$1,820,000**:
 - a) The Capped Undocumented Claims Fund (the "**Undocumented Claims Fund**") will compensate class members with Undocumented Claims to a maximum of **\$1,410,000**. Each individual Undocumented Claim will be eligible for up to a maximum of **\$35.00** per Settlement Class Member.

- b) The Capped Documented Claims Fund (the “**Documented Claims Fund**”) will compensate class members with Documented Claims to a maximum of **\$410,000**. Each individual Documented Claim will be capped at **\$2,500.00** per Settlement Class Member.
20. **In addition** to the Undocumented Claims Fund and Documented Claims Fund (collectively, referred to in the Settlement Agreement as the Capped Settlement Fund), Nissan agreed to contribute **\$490,000** towards the total amount of Class Counsel Fees (referred to in the Settlement Agreement as the **Contribution To Class Counsel Fees**).
21. As summarized by the Ontario Court in this Ontario Approval Judgment concerning the claims and distribution process under the Settlement:

“Claims/Distribution/Notice

Settlement class members must submit a claim form, either with or without documentation for damages, losses, costs or unreimbursed expenses. It is a simple process which provides discretion to the claims administrator. Funds will be distributed based on the undocumented/documented claims, with the representative plaintiffs Grossman and Arntfield (Ontario Action) or Levy (Quebec Action) pre-approved for a documented claim of \$2,000 given the documents they provided as representative plaintiffs. The claims administrator will withhold 2% or 5% as applicable of the amount payable to each Quebec settlement class member on behalf of the Fonds d’aide and remit those withheld amounts to the Fonds. Any remaining funds (if any) will be disbursed to organizations partnered with the Nissan Canada Foundation.

Notice is to be provided by email, social media, a bilingual press release, and publication on class counsel’s website.”

22. **In addition**, Nissan has agreed, in accordance with Article 4.10 of the Settlement Agreement, to pay for all Administration Expenses payable to the Claims Administration for the costs of administering the settlement, including all notice costs.
23. In accordance with the amounts and estimates confirmed by the Claims Administrator prior to the Approval Hearing in the Ontario Action, the Administration Expenses are

\$364,374 (before taxes). Once HST is added, this represents a total sum of \$411,742.62.

24. Ontario Counsel and Quebec Counsel are seeking separate, but consistent, orders approving the Settlement Agreement from this Court and the Superior Court of Quebec (referred collectively to in the Settlement Agreement as the Approval Orders).
25. Based on records provided by Nissan, Class Counsel has determined that there are approximately 183,916 Ontario Class Members and approximately 384,000 Quebec Class Members, for a total of approximately 567,000 people in the Settlement Class.

PART THREE: APPROVAL OF THE SETTLEMENT AGREEMENT

26. The Parties respectfully seek this Honorable Court's approval of the Settlement Agreement (including its Preamble and Schedules, as modified by this Court's Judgment dated April 26, 2024 issuing the Pre-Approval Orders) and the issuance of the Approval Order (final judgment) compelling the Parties and the Class Members to comply with its terms and conditions for the reasons that follow, which will be further elaborated at the Approval Hearing.
27. Pursuant to the Settlement Agreement, the Parties have agreed to request approval by this Honorable Court of this Settlement Agreement.
28. Article 590 of the C.C.P. requires that the Court approve a transaction settling a class action if the Court is satisfied that the terms of the settlement are fair, reasonable and in the best interests of the class.
29. The Plaintiff believes and submits that the Settlement Agreement is fair, equitable and reasonable, and that it is in the best interests of the Class Members and amounts to an adequate resolution of the Class Action, *inter alia*, for the reasons detailed below.

30. The Settlement Agreement is evidently subject to this Honorable Court's approval, hence the present application.
31. This Honorable Court recently summarized the governing principles for approving class action settlements as follows²:

2. Is the Transaction fair, reasonable and equitable to all class members?

2.1 The governing principles

[27] The Court must approve the Transaction if it is fair and equitable and if it is in the members' best interest who will be bound by it.

[28] As Justice Mark Schragger of the Québec Court of Appeal wrote, the Court must « garder à l'esprit les grands principes et objectifs sous-jacents aux actions collectives, soupeser les avantages et inconvénients du règlement, de même que les concessions réciproques, les risques d'un procès et les coûts à encourir ». Justice Schragger explains that the « évaluation du caractère juste et raisonnable de la transaction s'articule souvent autour des critères suivants », namely :

- Les probabilités de succès du recours;
- L'importance et la nature de la preuve administrée;
- Les modalités, termes et conditions de la transaction;
- La recommandation des avocats et leur expérience;
- Le coût anticipé et la durée probable du litige;
- Le cas échéant, la recommandation d'une tierce personne neutre;
- La nature et le nombre d'objections à la transaction;
- La bonne foi des parties et l'absence de collusion

[29] These criteria are not cumulative; they must be appreciated and weighed as parts of a whole. The Court shares Justice Lukasz Granosik's view that « la bonne foi des parties et l'absence de collusion » is a « condition *sine qua non* de la validité de la transaction envisagée ».

[30] Several judgments relying on Justice Bisson's reasons in *Schneider* also take into consideration two further factors: the representatives' agreement and the number of exclusions.

2 Leclerc c. FormerXBC Inc. (Xebec Adsorption Inc.), [2023 QCCS 3952](#), par. 27-31.

[31] The principles of procedure warrant that settlements must be favoured. This entails that it must be accepted that compromises are to be made by all sides.

The Probability of Success

32. While the Plaintiff maintains that her action is well founded, Nissan contests her claims and allegations. Indeed, this action was contested by Nissan, including multiple appeal proceedings, and the settlement negotiations themselves (which included trip to Toronto, a private mediation that took place in Toronto and negotiations continuing over many months thereafter as well) were long and difficult as well.
33. It is clear that the Parties would have entered into a serious adversarial debate, *inter alia*, with respect to the Defendant's conduct and alleged faults and negligence, the existence of damages, the quantum of any damages, and on the issue of the claim for punitive damages, all of which would have an impact on the Court's appreciation of the merits of the case.
34. We estimate the length of the further litigation of the class action to be over three years excluding any appeals.
35. Any trial would also have involved bringing in Québec Class Members to testify, extensive discoveries and extensive expert evidence by both parties.
36. Ultimately, it remains far from certain that Plaintiff would succeed at trial in proving his claims against the Defendant, with respect to either fault and liability or the amount of damages to which Québec Class Members may be entitled.
37. As such, and as is the case in all class actions (even consumer cases under the C.P.A. and C.C.Q. and privacy case), there was always the risk that the class action would not be successful on the merits, after many years of litigation. This risk is

abated through the Settlement Agreement, which guarantees compensation to Settlement Class Members, immediately.

38. As this Honorable Court recently mentioned in the case of *Abihisira vs. Ticketmaster Canada LP et. al.*, 500-06-001153-218, December 7, 2022, at paragraphs 29-31:

“[29] Any litigation involves some level of risk.

[30] One of these serious risks to such litigation was recently confirmed on the merits of a class action in *Union des consommateurs c. Air Canada* [2022 QCCS 4254, paras. 38-45, 140, 154, 156, 158, 160, 186]. where the Court, after concluding that Air Canada committed a violation of the *Consumer Protection Act*, dismissed the class action because it concluded that consumers would have paid the final price regardless and, as such, did not suffer any prejudice. Even if this judgment is eventually under appeal, it illustrates the serious risks faced by the Representative Plaintiff and the Class members.

[31] The risk that the Class action be unsuccessful on the merits, after many years of litigation, is always present.”

The recommendation of Experienced Counsel and Approval of the Plaintiff

39. Class Counsel and counsel for the Defendant, who have significant expertise in the area of class actions, have negotiated and recommended the terms and conditions of the Settlement Agreement (with the assistance of the Honorable former Supreme Court of Canada Justice Thomas Cromwell, further to a July 26, 2023 private mediation held in Toronto).
40. Class Counsel believes that the settlement is fair to the Settlement Class Members in light of the risks that would arise from continuing the litigation and in light of the benefits that the Settlement Agreement immediately offers the Settlement Class Members.
41. The Defendant consents to the approval of the present Application and seeks to have the Settlement Agreement approved by the Court.

42. In light of the above, Class Counsel believes that the Settlement Agreement is fair and reasonable, respects the rule of proportionality and provides substantial relief and benefits to the Settlement Class Members in the circumstances and in light of the risks that would arise from continuing the litigation.
43. Plaintiff has full knowledge of the case and has provided her instructions and consent to enter into said Settlement Agreement on her behalf and on behalf of the Québec Class Members.

The Future Expenses and the Probable Length of the Litigation

44. If the case was to proceed, there would be protracted litigation, as well as very extensive and costly discoveries and significant expert costs, as detailed above.
45. In addition, and as previously mentioned, the present action would take several years to be decided on the merits and a Judgment in favor of the Québec Class Members could be appealed, which would cause further delays.
46. It is in the interests of judicial economy and proportionality that the Settlement Agreement be approved.

The Notice Program and the Number and Nature of any Opt-Outs and/or Objectors

47. The notice plan for the Pre-Approval Notices, which was approved and ordered by the Court last week on April 26, 2024 (the “**Pre-Approval Judgment**”) has already been implemented this week by the Claims Administrator, which will increase the likelihood that potential claimants under the Settlement have been properly notified and will be able to participate in the Settlement.

48. In this regard, the Claims Administrator has confirmed that the “digital notice campaign (and press release) began on May 1st” and confirmed the following to the undersigned attorneys:

| MEDIA | INSERTION DATE(S) | UNIT | DELIVERY |
|--|---|----------------------|---------------------------------|
| Digital Media Goal: 384,000 impressions targeting Adults 18+ in Quebec via Google Display & Facebook/Instagram in English and French | Start: May 1, 2024 End: May 30, 2024 | Banners Image Ads | TBD / 384,000 Impressions |
| <i>CNW Press Release</i> | Wednesday, May 1, 2024 | Press Release | N/A |

“Email notice (after removing duplicates and bounces):

- Sent to 97,859 recipients”

49. We shall of course be filing the Claims Administrator’s detailed notice report, after the completion of the notice plan for the Pre-Approval Notices and before the Approval Hearing herein.

50. In addition, on May 1, 2024, the undersigned attorneys also posted the Pre-Approval Judgment, the Pre-Approval Notices (in both Short Form and Long Form, and in both languages), and the Settlement Agreement (in both languages), on our firm website and on the Quebec Class Actions Registry.

51. In the April 26, 2024 Pre-Approval Judgment, this Honorable Court set the deadline for filing an objection at May 30, 2024, if in writing or at the June 6, 2024 Approval Hearing, if in person. The undersigned attorneys will of course bring any objections received to the attention of the Court.

52. To date, no Class Members have submitted an objection or comment to the Settlement Agreement pursuant to the extensive notice program which has already begun this week, and pursuant to the extensive notice program which was already completed in the context of the Ontario settlement approval hearing which was held on April 24, 2024 and which led to the Ontario Approval Order.
53. Pursuant to the Court ordered notice program conducted following the authorization of the class action in the fall of 2021, the Québec Class Members had until December 17, 2021 to send an opt out (exclusion) notice to the clerk of the Superior Court of Quebec (with a copy sent to the undersigned attorneys' email address). That being said, we note that the Court ordered opt out deadline and procedure were not necessarily respected by all, the *plumitif* is attached herewith as **Exhibit R-4**. In this regard:
- a) The *plumitif* indicates a total of 17 named exclusions;
 - b) The undersigned attorneys received an additional 7 exclusion communications. None of these 7 additional names appear on the *plumitif* and we therefore cannot confirm if and when the Court Clerk received their exclusion notices.

The Good Faith of the Parties and the Absence of Collusion

54. The Settlement Agreement was the product of good faith, adversarial, and arm's length negotiations over the course of many months, which included one full day of private mediation before the Honorable Justice Cromwell.
55. The Defendant has thus far contested all aspects of the Class Action including multiple appeal proceedings, as detailed hereinabove.
56. The settlement negotiations lasted many months. The case, including the negotiations that led to the settlement, were all done in an adversarial manner and hard fought up until the end.

PART FOUR: APPROVAL OF CLASS COUNSEL FEES AND DISBURSEMENTS

57. The *Mandat professionnel et convention d'honoraires* was signed by Plaintiff and Class Counsel on February 11, 2018 (the "**Mandate Agreement**").

58. The Mandate Agreement signed with the Plaintiff provides for the following calculation of Class Counsel Fees:

a. all disbursements incurred;

and

b. attorneys' fees with regard to the present class action of the higher of the following two calculations:

(i) an amount equal to thirty-three percent (33%) of the total amount received, including interest, from any source whatsoever, whether by settlement or by judgment;

or

(ii) an amount equal to multiplying the total number of hours worked on by the attorneys or other professionals in accordance with their hourly rates, which range between \$350 and \$700 per hour. This amount will then be multiplied by a multiplier 3.5 to arrive at the total fee. (The hourly rates are reviewed from time to time)

and

c. all applicable taxes on said amounts in paragraphs (a) and (b).

These attorneys' fees extend to all sums received for and in the name of the whole group affected by the present class action (or potentially received if determined on a collective basis) and are in addition to the judicial fees that can be attributed to the attorneys. In the case where a specific amount of money is not awarded

collectively, whether by settlement or by judgment, or where each class member is compensated only for their individual claim, section b. (i) above shall be read to mean thirty-three percent (33%) of the total value as if every possible class member made such a claim.

59. A mandate agreement between a representative plaintiff and class counsel binds the class members. In a case in which it is fair and reasonable to class members and not contrary to the provisions of the Civil Code of Quebec, the Court should respect the mandate agreement and apply it in its entirety³.
60. As stated at paragraph 18 herein, Class Counsel quantifies the Recovery Amount as being the sum of \$2,721,742.62. Class Counsel are seeking approval of fees in the sum of \$816,522.79, which is 30% of the recovery amount, plus applicable taxes and disbursements in each jurisdiction.
61. Class Counsel consists of four law firms – three firms represent the Ontario Plaintiffs, and the undersigned attorneys represent the Quebec Plaintiff. As at the date of the April 2024 settlement approval hearing in Ontario, the Ontario Class Counsels had collectively recorded over 3,466.8 hours or \$2,198,704 + HST (\$285,831.52) for the total sum of \$2,484,535.52 worth of time.
62. Class Counsel collaborated and worked efficiently on this action. Ontario Counsel requested 75% of Class Counsel Fees + HST.
63. The undersigned Québec Counsel requests 25% of Class Counsel Fees, namely 25% of \$816,522.79, plus GST and QST, plus disbursements.
64. Pursuant to the Settlement Agreement, Class Counsels Fees approved by the Courts, that are in excess of the Contribution To Class Counsel Fees of \$490,000 payable by

3 *Guilbert c. Sony BMG Musique (Canada) inc.*, [2007 QCCS 432](#), paras. 26 & 45 (confirmed by the Court of Appeal in *Sony BMG Musique (Canada) inc. c. Guilbert*, [2009 QCCA 231](#))

Nissan, are to be made payable out of the Undocumented Claims Fund, within 15 days of the Effective Date.

65. The said Class Counsel Fees are more than reasonable under the circumstances of this case, given the significant amount of time spent and invested by Class Counsel in instituting and pursuing this matter and in negotiating and concluding the significant Settlement, and the significant risk taken by Class Counsel in taking on this matter on a purely contingency basis.
66. In addition, since the signing of the Settlement Agreement, Québec Class Counsel have and will continue to devote significant time to answer and address Class Members' multiples queries, issues, and comments directly and they will maintain and update their firm website www.lexgroup.ca, both in French and in English, to inform Class Members of the settlement process going forward, aside from Québec Counsel's ongoing communications with the Claims Administrator, counsels for Nissan in this matter, Ontario Counsel, and the media if required.
67. Finally, Québec Counsel have not received any funding from the *Fonds d'aide aux actions collective* in the present matter.
68. As per clause 2 of the Mandate Agreement signed by the Plaintiff, 33% of the total Recovery Amount of \$2,721,742.62 would represent \$898,175.06 (plus taxes and disbursements), instead of the 30% (\$816,522.79 plus taxes and disbursements) being requested by all Class Counsel combined.
69. As mentioned above, the undersigned Québec Counsel only request 25% of the total Class Counsel Fees, namely 25% of \$816,522.79 = **\$204,130.70 (plus GST and QST), plus disbursements.**
70. As concerning what amounts are to consider as the total settlement value when applying the percentage mentioned in the said Mandate Agreement, the Honorable Justice Lussier, J.S.C. recent confirmed (in another Data Breach Class Action settlement) that the Court should include all benefits offered to the Class Members,

the administration costs, the notification/publication costs and the Class Counsel Fees and disbursements themselves: *Benabou c. StockX*, [2022 QCCS 2527](#) (par. 43 (v)):

“The amount of Class Counsel Fees under the Settlement Agreement is lower than what was agreed to in the Professional Mandate & Attorneys’ Fee Agreement signed with the Plaintiff. It also represents a more than reasonable percentage of the total amount to be potentially reimbursed to class members pursuant to the Settlement. In addition, and according to case law, the calculation of the total settlement value would take into account not only this amount to be potentially distributed, but also the TransUnion credit monitoring services to be offered free of charge to all 122,970 Class Members across Canada, the administration costs, the publication/notification costs, and the Class Counsel Fees”.⁴

71. Indeed, the parties herein have agreed on the total **non-reversionary** amount to be disbursed by Nissan, namely the total Recovery Amount of \$2,721,742.62, which amount is comprised of the Capped Settlement Fund, Nissan’s Contribution to Class Counsel Fees and the Administration Expenses. Accordingly, the Class Counsel Fees being submitted for approval (i.e. 30% as opposed to 33% of said amount) represents a negotiated reduction and compromise as compared to what the Plaintiff agreed to as being reasonable in the Mandate Agreement. As mentioned above, the undersigned attorneys are only asking this Honorable Court to approve its 25% portion of said total Class Counsel Fees, plus taxes and disbursements.
72. The requested amount of 30% is within the range of reasonableness, as recently confirmed by the Court of Appeal in *A.B. c. Clercs de Saint-Viateur du Canada*, [2023 QCCA 527](#), par. 58, and in many subsequent judgments rendered by this Honorable Court.

4. Also see for example the following cases which confirm the same reasoning: *Zuckerman c. Target Corporation Inc.*, [2018 QCCS 2276](#) at par. 32 (iii) and footnote 16 (the Honorable Justice Hamilton, J.S.C. as he then was, once again in another Data Breach Class Action) and *Rabin c. HP Canada Co.*, [2019 QCCS 1511](#) at par 26 and footnote 6 (the Honorable Justice Duprat J.C.S).

73. As of **May 3, 2024**, the straight docketed time of Quebec Counsel in this matter is the following, for a total of \$560,712.50 (**plus taxes**) in fees, plus disbursements of \$8,717.96 (taxes included):

| Lawyer | Total Time Spent in Hours | Hourly Rate | Value |
|---------------------|---------------------------|-------------|--------------|
| David Assor | 518.10 h | \$700 | \$353,670.00 |
| Dominique Biggs | 38.90 h | \$350 | \$13,615.00 |
| Laura Meslati | 32.50 h | \$250 | \$8,125.00 |
| Joanie Lévesque | 344.35 h | \$450 | \$154,957.50 |
| Sarah Rasemont | 42.45 h | \$350 | \$14,857.50 |
| Laurine Gibeaux | 44.85 h | \$250 | \$11,212.50 |
| Thu-Dieu Pham-Luu | 17.10 h | \$250 | \$4,275.00 |
| | | | |
| Total hours: | 1,038.25 h | | |

74. Based on past experience and involvement in the post-settlement administration of other class action settlements, the work involved for Class Counsel's ongoing future obligations to the settlement process beyond the final approval hearing will continue. In particular, Class Counsel estimates that such work represents in this particular case an approximate amount of \$20,000 to \$25,000.
75. Accordingly, the requested amount of Class Counsel Fees under the Settlement Agreement is much lower than what was agreed to in the Professional Mandate & Attorneys' Fee Agreement signed with the Plaintiff. It also represents a more than reasonable percentage of the significant total settlement value herein and in fact represents a significant **negative multiplier** on docketed time in the file.
76. Indeed, the undersigned Quebec Counsel only request 25% of the total Class Counsel Fees, namely 25% of \$816,522.79 = **\$204,130.70 (plus GST and QST), plus disbursements (\$8,717.96, taxes included)**.

Time to be Spent by Class Counsel

77. As mentioned above, based on past experience and involvement in the post-settlement administration of other class action settlements, it is likely that Class Counsel's ongoing future obligations to the settlement process will involve work beyond the final approval hearing, especially concerning the claims process as detailed in the Settlement Agreement and toward the request for a final administration report and closing judgment (and the distribution of any possible balance remaining).
78. At all times during the proceedings and after the final approval hearing, Class Counsel engaged and will engage with Class Members in the language of their choice (French or English), in order to keep them informed of the proceedings.
79. No additional fees or disbursements will be requested by Class Counsel for this future work.

The Experience of the Attorneys

80. Me David Assor is a member in good standing of the Quebec Bar since 2001 and of the Law Society of Ontario since 2021. Me Assor has practiced general commercial and civil litigation since 2001 and specialized in plaintiff-side class action litigation since 2005. In 2011, Me Assor created the law firm of Lex Group Inc. which is also specialized in litigation in general and class actions in particular. As such, a vast majority of class counsel's work is in class actions which are all done on a contingency basis, meaning that for cases that are not successful, the firm receives no payment for work performed, which in some cases is quite significant.
81. Me Assor is also a repeat contributor / writer on class action issues and case law on the legal research website *La référence* and is a repeat guest lecturer on the topics of class actions and privacy law at the McGill University Faculty of Law.

82. Me Assor has been a sitting member of the Quebec Bar's Disciplinary Committee since 2016, is a sitting member of the Bar of Montreal's Liaison Committee with the Superior Court in Civil Matters since 2023, has been a member of the board of directors of the Lord Reading Law Society since 2016 (immediate former Bar Liaison), has sat as a member of the Bar of Montreal's Access to Justice in the English Language Committee from 2016 to 2019, was a member of the Advocates' Society, and was named a Governor of the Quebec Bar Foundation in 2020. Me Assor was also ranked and included in the 2024 Canadian Legal Lexpert Directory for Leading Practitioners in Class Actions.
83. Aside from Me Assor who has handled this matter since its original filing, the other professional(s) listed above were junior attorneys or professionals who worked exclusively for Lex Group Inc. at the relevant time.
84. At all relevant times, Lex Group Inc. paid regular salaries to said junior professionals all the while continuing to prosecute this class action, and other class actions, without any guarantee of compensation.

Time Dedicated

85. Since 2018 in the present matter, Québec Counsel has dedicated significant time and disbursements to the present file, as detailed above, all without any guarantee of payment.
86. At all times, this litigation was high-risk. Québec Class Counsel conducted extensive legal research and documents review in support of this claim, filed a successful appeal of the authorization judgment in order to further expand the class definition and possible claims, and dealt with the Québec Class Members who were interested in the case.
87. The process of finalizing the Settlement Agreement continued for many months following the achievement of a settlement in principle. Further work was also

undertaken in anticipation of the notice approval and the Approval Hearing (including the preparation of the present Application within the Court ordered deadlines).

88. Further, Québec Counsel will be maintaining contact with the Québec Class Members who will be calling and/or e-mailing Lex Group Inc. pursuant to the notification detailed in the Settlement Agreement.

The Importance of the Issue

89. Consumer protection and privacy issues are directly related to the access to justice of several thousands of persons.
90. Often, claims of this nature involve relatively small sums of money for which individuals are not ready to initiate a lawsuit. It is one of the reasons why a class action is often the only way to obtain justice against large companies, institutions, or governmental authorities.
91. If it were not for this class action, many Class Members would not have been likely to institute individual actions to recover damages against the Defendant which has significant financial means at their disposal.

The Difficulties of this Case

92. Some of the difficulties of litigating this case at trial would have been for the Plaintiff to prove to the Court:
- a. that the Defendant was at fault in relation to the Data Incident;
 - b. that the Québec Class Members had suffered compensable and moral damages as a result thereof, none of which was admitted.

c. that the Québec Class Members can claim punitive damages (which was one of the reasons for the successful appeal filed by the Plaintiff herein).

93. These claims would have been the subject of extensive debate and contestation.

94. These important questions would have also required extensive testimony including possible expert evidence.

The Risk Assumed

95. As is oftentimes the case in class actions, the risk of success or failure was borne entirely by Class Counsel. In the present matter, Class Counsel took on the entire case on a contingency basis.

96. This meant that neither the Plaintiff nor any Québec Class Members were asked to contribute any fees for the time spent on the file, nor for any of the disbursements made on their behalf by Québec Counsel.

97. Indeed, the Mandate Agreement provides the following:

5. The parties agree that neither the Representative nor the members of the group will be required to pay any fees, disbursements, or costs other than those provided for in paragraph 2 of the present Agreement.

98. As detailed above, the Defendant has contested all elements of the class action proceedings since 2018.

99. Given that in the case of failure, Class Counsel receives nothing – and even risks losing – in the case of success, they should be properly compensated for their efforts and for the financial risk (both in time and money) that they have assumed.

100. The Court of Appeal has recently confirmed the following in *A.B. c. Clercs de Saint-Viateur du Canada*, [2023 QCCA 527](#):

[54] Il est ainsi généralement admis que pour apprécier le caractère juste et raisonnable des honoraires, le juge doit aussi considérer le risque couru par les avocats. **Dans le contexte d'une convention d'honoraires à pourcentage, la Cour supérieure a reconnu que ce facteur pourrait même primer sur le temps consacré au dossier par les avocats. Dans tous les cas, le risque doit s'apprécier au moment où les avocats ont reçu le mandat du représentant, et non au moment de la demande d'approbation.**

(Emphasis added).

101. As the Honorable Justice Bisson recently emphasized the importance of rewarding the risk taken by class Counsel in approving the *Herron* settlement: ⁵

[57] Les enjeux en matière d'actions collectives sont très importants sur le plan financier et le cabinet qui accepte d'œuvrer en demande accepte d'assumer la totalité des frais du recours et de n'être payé qu'en cas de succès.

[58] Pour assurer la viabilité du véhicule procédural qu'est l'action collective, il est essentiel que des avocats compétents acceptent de prendre de tels risques. Or, sans une compensation en cas de succès qui tient compte du risque assumé, aucun avocat n'aurait d'intérêt à accepter de tels risques.

[59] Lorsque les procureurs du groupe ont accepté d'agir en l'espèce, ils ne se fiaient pas sur la possibilité qu'une entente à l'amiable soit conclue; ils étaient plutôt prêts à aller jusqu'au bout et à investir tout le temps, les efforts et les ressources financières nécessaires pour mener à terme l'action collective, ne sachant pas si le dossier sera gagné ou perdu au mérite.

5. *Schneider (Succession de Schneider) c. Centre d'hébergement et de soins de longue durée Herron inc.*, [2021 QCCS 1808](#), par. 57-59.

102. As mentioned above, in the case of *Abihisira vs. Ticketmaster Canada LP et. al.*, 500-06-001153-218, December 7, 2022, this Honorable Court mentioned the following at paragraphs 29-31:

“[29] Any litigation involves some level of risk.

[30] One of these serious risks to such litigation was recently confirmed on the merits of a class action in *Union des consommateurs c. Air Canada* [2022 QCCS 4254, paras. 38-45, 140, 154, 156, 158, 160, 186]. where the Court, after concluding that Air Canada committed a violation of the *Consumer Protection Act*, dismissed the class action because it concluded that consumers would have paid the final price regardless and, as such, did not suffer any prejudice. Even if this judgment is eventually under appeal, it illustrates the serious risks faced by the Representative Plaintiff and the Class members.

[31] The risk that the Class action be unsuccessful on the merits, after many years of litigation, is always present.”

103. Québec Counsel accepted the mandate in the present matter, solely accepting all of the risks in time and disbursements, and being ready to prosecute this matter all the way until final judgment on the merits, including any possible appeals along the way. It has worked diligently to advance this litigation to the point of settlement, without any payment for its fees or any guarantee of payment.

104. It has indeed invested much more time into the file as compared to what is being requested in Class Counsel Fees under the Settlement Agreement.

The Professional Services are Unusual and Require Specific Expertise

105. There are only a small number of attorneys who take on class action matters in Quebec and Canada.

106. This type of work requires particular expertise and professionalism.

107. Often, in this type of work, communication with the public and media is also necessary (e.g. by communicating with Class Members, maintaining and updating a

website, being interviewed and issuing press releases, etc.). This requires the firm to be more proactive in order to protect the interests of the Class Members.

The Result Obtained

108. We have already fully summarized the Settlement hereinabove.
109. These simple procedures for submitting claims will ensure that Québec Class Members with valid claims will be more inclined to file said claims and will ensure that available settlement funds can be distributed seamlessly, which is a very significant benefit and advantage being offered by the proposed Settlement Agreement herein.
110. Indeed, a great number of Québec Class Members will be able to claim compensation without being required to file any documentation or evidence of out-of-pocket disbursements at all.
111. The notice plan for the Pre-Approval Notices, which was approved and ordered by the Court last week on April 26, 2024, has already been implemented this week by the Claims Administrator, which will increase the likelihood that potential claimants under the Settlement have been properly notified and will be able to participate in the Settlement.

Fees Not Contested

112. As per Article 5.1 of the Settlement Agreement, the Defendant acknowledges that it is not a party to the application seeking the approval of Class Counsel Fees and does not take a position on such an application.
113. Further, to date, no Class Member has indicated their intention to contest the request for Class Counsel Fees.
114. The undersigned attorneys respectfully submit that said requested Class Counsel Fees and disbursements, are fair and reasonable under the circumstances and considering the significant and beneficial results obtained for the Class Members.

PART FIVE: CONCLUSION

115. Plaintiff and Class Counsel respectfully submit that the Court should approve the Settlement Agreement reached between the Parties given that it is more than reasonable, appropriate and in the best interests of the Parties and the Class Members, and considering the complexities of the proceeding and the risk faced by the Plaintiff and by Class Counsel going forward.
116. In reaching this settlement, Class Counsel and Plaintiff engaged in lengthy hard-fought arm's length negotiations, which involved a full day of private mediation with a former Supreme Court of Canada Justice.

117. Plaintiff respectfully submits that the Settlement Agreement allows for a quick and easy form of relief and significant compensation for the Class Members and should be approved by this Honorable Court. The Defendant consents to the application to approve the Settlement Agreement.
118. The requested Class Counsel Fees and the disbursements represent less than what the Professional Mandate & Attorneys' Fee Agreement signed by the Plaintiff provides, reflect the time and disbursements expended by Class Counsel, the complexities of the proceeding and the risk faced by Class Counsel from the outset of this case, and the very significant benefits offered by the Settlement. As such, we respectfully submit that the Class Counsel Fees are fair and reasonable and ought to be approved.

| POUR CES MOTIFS, PLAISE AU TRIBUNAL DE: | FOR THESE REASONS, MAY IT PLEASE THE COURT TO: |
|---|---|
| DÉCLARER qu'aux fins du présent jugement, les définitions énoncées dans l'Entente de règlement s'appliquent et sont intégrées au présent jugement; | DECLARE that for the purposes of the present judgment, the definitions in the Settlement Agreement apply and are integrated in the present judgment; |
| ACCUEILLIR la <i>Demande d'approbation d'un règlement d'une action collective et des Honoraires des Avocats du Groupe</i> ; | GRANT the <i>Application to Approve a Class Action Settlement and for Approval of Class Counsel Fees</i> ; |
| APPROUVE l'Entente de règlement en tant que transaction au sens de l'article 590 du <i>Code de procédure civile</i> ; | APPROVES the Settlement Agreement as a transaction pursuant to article 590 of the <i>Code of Civil Procedure</i> ; |

| | |
|---|--|
| <p>ORDONNER et DÉCLARER que l'Entente de règlement (y compris son préambule et ses Annexes) est juste, raisonnable et dans l'intérêt des Membres du Groupe de Règlement doit être mise en œuvre selon ses dispositions, et constitue une transaction au sens de l'article 2631 du <i>Code civil du Québec</i>;</p> | <p>ORDER AND DECLARE that the Settlement Agreement (including its Recitals and its Schedules) is fair, reasonable and in the best interest of the Settlement Class Members and constitutes a transaction pursuant to Article 2631 of the <i>Civil Code of Quebec</i>;</p> |
| <p>ORDONNER aux parties et aux Membres du Groupe, sauf ceux qui se sont exclus conformément à l'Entente de règlement, de se conformer aux termes et conditions de l'Entente de règlement;</p> | <p>ORDER the parties and the Class Members, with the exception of those who are excluded in accordance with the terms and conditions of the Settlement Agreement, to abide by the terms and conditions of the Settlement Agreement;</p> |
| <p>ORDONNER que les Honoraires des Avocats des groupes au montant total de \$816,522.79, plus taxes applicables et plus déboursés, soient payés aux Avocats du Québec et aux Avocats de l'Ontario, conformément à la l'Entente de règlement;</p> | <p>ORDER that the Class Counsel Fees in the total amount of \$816,522.79, plus applicable taxes and plus disbursements, be paid to Québec Counsel and Ontario Counsel, in accordance with the Settlement Agreement;</p> |
| <p>ORDONNER la défenderesse à payer tous les Frais d'administration tel que défini dans l'Entente de règlement;</p> | <p>ORDER Defendant to pay all Administration Expenses as defined in the Settlement Agreement;</p> |
| <p>APPROUVER le Plan de publication des Avis d'approbation conformément à la clause 6.3 de l'Entente de règlement;</p> | <p>APPROVE the Notice Plan for the Approval Notices in accordance with clause 6.3 of the Settlement Agreement;</p> |
| <p>APPROUVER la forme et le contenu des Avis d'approbation, essentiellement sous la forme abrégée et détaillée se trouvant à la pièce R-3, dans leurs versions anglaise et française;</p> | <p>APPROVE the form and content of the Approval Notices, substantially in the short and long forms set forth in Exhibit R-3, in their English and French versions;</p> |
| <p>APPROUVER le Plan de notification prévu à l'article 6.3 de l'Entente de règlement, lequel détaille le mode de diffusion des Avis d'approbation aux membres;</p> | <p>APPROVE Notice Plan provided for in Article 6.3 of the Settlement Agreement, which details the method of dissemination of the Approval Notices;</p> |

| | |
|---|---|
| <p>ORDONNER aux Avocats des groupes et à l'Administrateur des réclamations de diffuser les Avis d'approbation conformément à la clause 6.3 de l'Entente de règlement;</p> | <p>ORDER Class Counsel and the Claims Administrator to disseminate the Approval Notices pursuant to clause 6.3 of the Settlement Agreement;</p> |
| <p>ORDONNER à l'Administrateur des réclamations d'utiliser les renseignements identifiables concernant une personne qui lui sont fournis tout au long de la procédure de réclamation dans le seul but de faciliter la procédure d'administration des réclamations conformément à l'Entente de Règlement et à aucune autre fin;</p> | <p>ORDER that the Claims Administrator shall use the personally identifiable information provided to it throughout the claims process for the sole purpose of facilitating the claims administration process in accordance with the Settlement Agreement and for no other purpose;</p> |
| <p>ORDONNER ET DÉCLARER que le Jugement à intervenir constitue un Jugement obligeant la communication de renseignements personnels au sens des lois sur la protection des renseignements personnels applicables, et que le Jugement en question respecte les exigences de toutes les lois sur la protection des renseignements personnels applicables;</p> | <p>ORDER AND DECLARE that the Judgment to intervene constitutes a Judgment compelling the communication of personal information within the meaning of applicable privacy laws, and that said Judgment satisfies the requirements of all applicable privacy laws;</p> |
| <p>LE TOUT sans frais de justice.</p> | <p>THE WHOLE without legal costs.</p> |

MONTREAL, May 6, 2024

(s) *Lex Group Inc.*

**Lex Group Inc.
Per: David Assor
Class Counsel
Attorneys for the Plaintiff and
the Quebec Class**

SOLEMN DECLARATION

I, the undersigned, **David Assor**, attorney, practicing law at the offices of Lex Group Inc., situated at 4101 Sherbrooke Street West, in the City of Westmount and District of Montreal, do hereby solemnly declare:

1. THAT I am one of the attorneys for the Plaintiff in the present case;
2. THAT all the facts alleged in the present *APPLICATION TO APPROVE A CLASS ACTION SETTLEMENT AND FOR APPROVAL OF CLASS COUNSEL FEES* are true and accurate to my personal knowledge;

And I have signed:



DAVID ASSOR

Solemnly affirmed before me
at Westmount (Quebec),
this 6th day of May, 2024



Commissioner for oaths for
the Province of Québec



NOTICE OF PRESENTATION

TO :

Me Margaret Weltrowska
Me Erica Shadeed
Dentons Canada LLP
1 Place Ville-Marie
Bureau 3900
Montréal QC H3B4M7
margaret.weltrowska@dentons.com
erica.shadeed@dentons.com

Attorneys for Defendant

TAKE NOTICE that the *APPLICATION TO APPROVE A CLASS ACTION SETTLEMENT AND FOR APPROVAL OF CLASS COUNSEL FEES* will be presented for adjudication before the Honourable Justice Pierre Nollet, J.S.C., on **June 6, 2024, at 9:30 AM, in Room 2.08** of the Montréal Courthouse located at 1 Notre-Dame Street East, Montréal, Québec, or as soon thereafter as counsel can be heard.

DO GOVERN YOURSELF ACCORDINGLY.

MONTREAL, May 6, 2024

(s) Lex Group Inc.

Lex Group Inc.
Per: David Assor
Class Counsel
Attorneys for the Plaintiff and
the Quebec Class

David Assor

From: David Assor
Sent: May 6, 2024 3:33 PM
To: 'Shadeed, Erica'; 'margaret.weltrowska@dentons.com'
Cc: Nathalie Guilbert; Jennifer Lemarquis; Ryan Mayele
Subject: 500-06-000907-184 - Karine Levy vs. Nissan Canada Inc.
Attachments: R-1_Settlement Agreement with Schedules.pdf; R-1_TRADUCTION_Entente de règlement.pdf; R-3_Short Form Approval Notice_EN_QC.doc; R-3_Long Form Approval Notice_EN_QC.doc; R-4_Plumitif.pdf; R-2_Ontario Approval Order.pdf; Application to Approve Settlement_final.pdf

Importance: High



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| Date | May 6, 2024 | Heure/Time | Voir l'entête du courriel / See email header |
| EXPÉDITEUR / SENDER | | | |
| Nom/Name | Me David Assor | Cabinet / Firm | LEX GROUP INC. |
| Adresse courriel / Email Address | davidassor@lexgroup.ca | | |
| Ligne directe / Direct Line | 514-451-5500 (p./ext. 321) | | |
| Télécopieur / Fax | 514-940-1605 | | |
| DESTINATAIRES / ADDRESSEES | | | |
| Me Margaret Weltrowska Me Erica Shadeed Dentons Canada LLP 1 Place Ville-Marie Bureau 3900 Montréal QC H3B4M7 margaret.weltrowska@dentons.com erica.shadeed@dentons.com Attorneys for Defendant | | | |
| NATURE DU DOCUMENT NOTIFIÉ / NATURE OF DOCUMENT NOTIFIED | | | |

| | |
|---|--|
| Numéro de Cour / Court Number | 500-06-000907-184 |
| Noms des parties / Name of the parties | Karine Levy vs. Nissan Canada Inc. |
| Nature du document notifié / Nature of Document notified | <ul style="list-style-type: none"> - APPLICATION TO APPROVE A CLASS ACTION SETTLEMENT AND FOR APPROVAL OF CLASS COUNSEL FEES - Exhibits R-1 to R-4 |

(Class Action Division)
SUPERIOR COURT

**PROVINCE OF QUEBEC
DISTRICT OF MONTREAL**

KARINE LEVY

Plaintiff

v.

NISSAN CANADA INC.

Defendant

**APPLICATION TO APPROVE A CLASS
ACTION SETTLEMENT AND FOR
APPROVAL OF CLASS COUNSEL FEES**

ORIGINAL

Me David Assor



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