SUPERIOR COURT

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

N° : 500-06-000796-165

DATE : January 24, 2019

PRESIDING: THE HONOURABLE GARY D.D. MORRISON, J.S.C.

ALBERT HADIDA
Applicant

v.

NISSAN CANADA INC.
and
NISSAN NORTH AMERICA INC.
and
NISSAN MOTOR CO. LTD.
Respondents

JUDGMENT

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[1] Applicant Albert Hadida asks the Court to authorize him to take a class action against the three named Nissan Respondents on behalf of the following class:

> *All consumers in Quebec, who, any time between May 8, 2006 to November 30, 2015 (the "Class Period"), purchased and/or leased one or more of the Nissan Versa model years 2007-2012 recalled under Transport Canada Recall No. 2015402 (the "Defective Vehicles") manufactured, distributed, supplied, wholesaled and/or imported by Nissan.*

1- CONTEXT

[2] Applicant alleges that in July of 2013, he purchased a pre-owned 2009 Nissan Versa from a Montreal Nissan dealership. He adds that he was looking to purchase a "*safe vehicle*" and that Nissan had represented the 2009 Nissan Versa to be safe, both generally and specifically as regards the vehicles' coil springs.[1]

[3] In November of 2015, Nissan Canada mailed out "*to some, but not to all*" potential class members a document entitled "*Owner Notification Transport Canada 2015402*" (the "Recall Notice").[2]

[4] That Recall Notice referred to "*a defect which relates to motor vehicle safety*" in the 2007-2012 Nissan Versa vehicles and, further, identified the insufficient corrosion coating as the cause of fractures in the coil spring, with resulting increased risk of crash.

2- APPLICANT'S POSITION

[5] Accordingly, Applicant alleges that his vehicle, like the other 2007-2012 Nissan Versa vehicles, was affected by a latent defect at the time of sale, one which Respondents are presumed to know existed.

[6] In addition, Applicant alleges that there was sufficient information made available to Respondents from as early as June 2007, and then later, for them to have acquired actual knowledge of the defect. He further claims that Respondents nevertheless continued to manufacture and market defective vehicles without informing potential buyers of the existence of the defect until the Recall Notice in 2015.

[7] Applicant acknowledges having received the Recall Notice around November 2015. The repair parts were not then available, but he was supposed to receive another letter from Nissan informing him when they would be. He alleges that from receipt of the Recall Notice onwards, he was worried, stressed and concerned for his safety; he began driving slower and more cautiously.

[8] He claims that he never received the follow-up letter from Nissan, informing him when the necessary replacement parts would be available for repairs to his vehicle.

[9] Instead, in June of 2016, he was advised by a third-party mechanic that the front coil springs of his Nissan Versa were broken. A few days later, his vehicle was repaired by a Nissan dealer, without charge.

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1 Exhibit P-18.
2 Exhibit P-1.

[10] Applicant claims that notwithstanding the repair, the Respondents have violated the Quebec *Consumer Protection Act* [3] ("CPA"), including the failure to inform as to the existence of serious safety and security issues, such that, as a result, class members should be entitled to:

a) a reduction of their vehicle purchase or lease obligations to reflect the vehicle's diminished value;

b) damages for trouble and inconvenience;

c) moral damages; and

d) punitive damages, by reason of Nissan's handling of the recall and of the repairs.

[11] The contraventions of the CPA to which Applicant primarily refers are as follows:

- Sections 37, 38 and 53 CPA regarding the existence of latent defects;
- Section 39 CPA regarding the unreasonable delay to repair the defect, being allegedly 8 months in the present case;
- Sections 40 and 41 CPA regarding the violation of the warranty that the goods will conform to advertising and other statements;
- Sections 221 (a) and (g) CPA regarding falsely ascribing certain advantages to a product;
- Section 228 CPA regarding the failure to inform the consumers of the fact that the coil springs were defective and thereby increased the risk of crash.

[12] These contraventions, Applicant argues, give rise to the claimed damages by virtue of Section 272 CPA.

[13] The foregoing essentially represents Applicant's legal syllogism on which his proposed claim is based and for which he seeks authorization to institute his class action. For the sake of clarity, the claim is not based on the warranty provisions stipulated in the *Quebec Civil Code*.

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[3] CQLR, c. P-40.1.

3- RESPONDENTS' POSITION

[14] Respondents argue that the proposed class members have no cause of action given the voluntary recall and the resulting repairs at no expense to the vehicle owner on lessee. They argue more generally that Applicant and his proposed claim do not satisfy the criteria of Article 575 *Code of Civil Procedure* ("C.C.P."). Accordingly, they plead that a class action should not be authorized.

4- ANALYSIS

[15] In order to authorize a class action and designate a class member as representative plaintiff, the Court must be of the opinion that the criteria of Article 575 C.C.P. have been satisfied. That article reads as follows:

> ***575.*** *The court authorizes the class action and appoints the class member it designates as representative plaintiff if it is of the opinion that*
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> *(1) the claims of the members of the class raise identical, similar or related issues of law or fact;*
>
> *(2) the facts alleged appear to justify the conclusions sought;*
>
> *(3) the composition of the class makes it difficult or impracticable to apply the rules for mandates to take part in judicial proceedings on behalf of others or for consolidation of proceedings; and*
>
> *(4) the class member appointed as representative plaintiff is in a position to properly represent the class members.*

[16] In performing the authorization analysis, the Court is to avoid determinations as to the merits of the proposed action. The authorization phase is primarily intended to act as a filtering process for the purpose of preventing cases which are not "arguable" from moving forward[4]. In other words, the Court is to filter out cases that are not arguable, defensible, justifiable or supportable, or which are frivolous, untenable or clearly unfounded.[5]

[17] And notwithstanding the overriding importance of the principle of proportionality, it has been determined that this principle does not constitute a fifth criteria within the terms of Article 575 C.C.P.; that said, however, the authorization judge is to assess,

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4 *Infineon Technologies AG* v. *Option consommateurs*, [2013] 3 S.C.R. 600, at para. 65.
5 *Fortier* v. *Meubles Léon ltée*, 2014 QCCA 195, at para. 70.

where appropriate, the principle of proportionality in the analysis of the applicable criteria.[6]

[18] As for the social purpose and objective of class actions, prior case law has repeatedly confirmed that they are conceived to facilitate access to justice for class members so as to avoid a multiplicity of lawsuits with each member bringing forward his or her own claim.

[19] Accordingly, the proposed class action must actually constitute a claim at law, such that the proposed class representative is required to demonstrate, as opposed to prove, at the authorization phase[7] that he or she has an arguable case whose conclusions appear to be justified. This is often referred to as the "colour of right" and as a "*prima facie*" case.

[20] So as to expand that person's arguable claim into a class action, the questions of law or fact raised by the proposed class representative must essentially be "*identical, similar or related*" to those of the proposed class members. In this regard, even one such question has been considered to suffice.[8]

[21] Are these criteria met in the present matter?

4.1 Is there an arguable case in which the facts alleged appear to justify the conclusions sought? (Art. 575 (2) C.C.P.)

[22] This criteria is really at the heart of Nissan's contestation.

[23] It objects to the proposed class action having already made a voluntary recall and effected repairs at no cost to the vehicle owner or lessee. It asserts that it would be a "*dangerous precedent*" to authorize class action against car manufacturers in cases where they have already conducted a recall.

[24] In other words, what Nissan pleads is that it has already provided relief to proposed class members through its recall program, while at the same time arguing that by conducting a recall it has not admitted that a defect exists.

[25] Firstly, it is not necessary for the Court at this stage to determine whether or not Nissan's recall constitutes an admission.

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6 *Vivendi Canada Inc.* v. *Dell'Aniello*, [2014] 1 S.C.R. 3, at para. 66.
7 *Pharmascience inc.* v. *Option Consommateurs*, 2005 QCCA 437, at para. 25.
8 *Montréal (Ville de)* v. *Biondi*, 2013 QCCA 404.

[26] Secondly, and contrary to what Nissan is pleading, the fact that it has provided repairs without cost and reimbursed some expenses through a recall does not automatically constitute an obstacle to a consumer class action.[9]

[27] Certainly one can envisage such voluntary repairs as potentially reducing damages suffered by consumers, but it does not necessarily preclude in all cases the existence of other causes of action or damages.

[28] In the present matter, Applicant argues that not only did it take too long for Nissan to proceed with a recall and to then effect repairs, but Nissan also failed to inform consumers over the course of years that the vehicle was not safe and secure, contrary to its advertising. Accordingly, he takes the position that consumers are entitled to claim for a reduction in sale price and in punitive damages.

[29] It is important to note the distinction Applicant makes between damages resulting from the alleged defect and those relating to the failure to inform consumers of important safety information. This distinction was made by the Supreme Court of Canada in *Richard* v. T*ime Inc.*[10] as cited by the Quebec Court of Appeal in the *Fortin* case[11]:

> *[174] La preuve fait cependant voir que Mazda a depuis exécuté son obligation en corrigeant ce défaut (paragr. 272 a) L.p.c.). J'ai aussi conclu que les membres du Groupe 1 ne peuvent, par surcroît, obtenir une indemnisation additionnelle sous forme de réduction de leur obligation sur la base de la même cause, c'est-à-dire un défaut de conception. Je suis parvenu à ce résultat après avoir considéré qu'un recours sous le paragraphe 272 c) L.p.c. n'aurait pas été plus avantageux pour les membres de ce groupe.*
>
> *[175] Toutefois, ces derniers ont droit à une réduction de leur obligation en raison du manquement à la Loi dont Mazda s'est rendue coupable, soit son omission de divulguer une information importante (art. 228 et 272 L.p.c.). L'étendue du groupe pour cette partie de la réclamation doit se limiter aux propriétaires d'une Mazda 3, années 2004, 2005, 2006 et 2007, acquise entre le 3 octobre 2006 et le 28 janvier 2008, si, au moment de l'achat, ce véhicule était encore équipé d'un système de verrouillage déficient.*

[30] Of course, at the authorization stage, the Court is not to decide the merits of the claim. Accordingly, the Court need not, and does not, conclude that Applicant's claim is

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9 *Fortin* v. *Mazda Canada Inc.*, 2016 QCCA 31, at paras. 124 and 132; *Option Consommateurs* v. *Samsung Eletronics Canada Inc.*, 2018 QCCS 1751; *Abicidan* v. *Ikea Canada*, 2018 QCCS 5279, at para. 39.

10 [2012] 1 S.C.R. 265, at paras. 125-128.

11 *Fortin*, *supra* note 9.

well-founded or that it is ill-founded. To authorize the class action, it need only conclude that he has an arguable case, even if it appears fragile at this stage.

[31] In order to assess whether Applicant's allegations are sufficient to authorize a class action in relation to a CPA action for defects, the criteria to consider are those identified by the Court of Appeal in *Fortin*[12]:

> *[60] Je crois ne pas trahir la jurisprudence en concluant qu'un défaut caché selon la L.p.c., lorsqu'il prend l'aspect d'un déficit d'usage, exige, à l'instar du C.c.Q., de satisfaire aux critères suivants : 1) avoir une cause occulte, 2) être suffisamment grave, 3) être inconnu de l'acheteur et finalement 4) être antérieur à la vente.*

[32] Keeping in mind that at this stage the Court should adopt a supple, liberal and generous approach[13] and further, should consider alleged facts to be true[14], the Court is of the view that Applicant has an arguable case in the context of such criteria. And the fact that he purchased a used vehicle does not diminish his case.

[33] In addition, violations of the CPA provisions raised by Applicant give rise to an absolute presumption of prejudice.[15] This is in keeping with Section 272 C.P.A., which Applicant alleges is the key basis of the claim, the objective of which is to sanction all violations that are prejudicial to consumers by providing them with a variety of recourses, including punitive damages.

[34] Under the circumstances, the Court concludes that the Applicant has demonstrated an arguable case.

4.2 Do the claims of putative members raise identical, similar or related issues of law or fact? (Art. 575 (1) C.C.Q.)

[35] This authorization criteria is not particularly difficult to satisfy[16], as it is to be liberally interpreted. It is sufficient to identify one identical, similar or related issue, which need not necessarily result in a common response.[17] This principle applies even if the assessment of damages needs to be decided on an individual basis.

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12 *Ibid*, at para. 60.
13 *Infineon Technologies AG*, supra note 4.
14 *Lambert (Gestion Peggy)* v. *Écolait ltée*, 2016 QCCA 659, at para. 38.
15 *Time Inc.*, *supra* note 10, at para. 112.
16 *Infineon Technologies AG*, supra note 4, at para. 72.
17 *Vivendi Canada Inc.*, *supra* note 6, at paras. 58-59.

[36] Applicant has modified its questions, but the Court considers that it is appropriate to modify them further and to frame them as follows:

a) Did class members purchase or lease a Nissan Versa vehicle, model year 2007-2012?

b) When did the class member purchase or lease such a vehicle?

c) At what date did any Nissan Defendant acquire knowledge of the existence of the issue raised in its November 2015 Recall Notice?

d) Does the issue described in the said Recall Notice constitute a defect within the meaning of the CPA?

e) Did any Nissan Defendant make false or misleading representations to a consumer or fail to mention an important fact in any representation made to a consumer, within the meaning of the CPA?

f) Did any Nissan Defendant commit a fault in relation to its recall program or otherwise fail to satisfy its obligations in that regard? Was it a voluntary undertaking within the meaning of section 272 CPA?

g) Did any Nissan Defendant fail to satisfy the requirements of sections 37, 38, 39, 220, 221 or 272 CPA?

h) Are class members entitled to:

i. a reduction of their obligations and, if so, in what amount?

ii. damages for trouble and inconvenience resulting from Nissan's misrepresentations and illegal practice and, if so, in what amount?

iii. moral damages and, if so, in what amount?

iv. punitive damages and, if so, in what amount?

4.3 Does the composition of the class make it difficult or impracticable to apply the rules for mandates on behalf of others or for consolidation of proceedings? (Art. 575 (3) C.C.Q.)

[37] Respondents argue that the class definition, as described above, is flawed, primarily since it includes consumers who never had any problems with the coil springs

of their vehicle or who had repairs effected to their vehicle without charge or who obtained a refund for such repairs.

[38] Firstly, the Court is not bound at this stage by Nissan's argument that "*the vast majority of consumers*" had no operational problems with their vehicle. And even if there are presently no known cases of vehicle crashes, that does not preclude the institution of a class action. It is not a class action that is intended to cover only crash victims.

[39] At this stage, the Court considers the class definition as appropriate and, in any event, should a judge to whom is assigned the management of the class action once authorized be of the view that the proof, or even further explanations, justify a modification thereto, then the definition could accordingly be modified.

[40] As for satisfying the criteria of Article 575 (3) C.C.Q., one which is to be liberally analyzed[18], the Court is of the view that, at this stage, it is satisfied in the present matter. In fact, it is not, rightly so, vigorously contested.

4.4 Is the Applicant in a position to properly represent the class members as representative?

[41] Three criteria are relied on to analyse the proposed representative's ability to satisfy this requirement.[19] Those criteria are:

a) interest to sue;

b) legal capacity to act, and

c) absence of conflict with members of the class.

[42] In the present case, no serious grounds of contestation have been raised. And in any event, the Court considers that the criteria have been satisfied.

FOR THESE REASONS, THE COURT:

[43] **AUTHORIZES** the bringing of a class action in the form of an originating application in damages;

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[18] *Lambert (Gestion Peggy)*, *supra* note 14, at para. 58.
[19] *Infineon Technologies AG*, *supra* note 4.

[44] **APPOINTS** the Applicant the status of Representative Plaintiff of the persons included in the Class described as:

> *All consumers in Quebec, who, any time between May 8, 2006 to November 30, 2015 (the "Class Period"), purchased and/or leased one or more of the Nissan Versa model years 2007-2012 recalled under Transport Canada Recall No. 2015402 (the "Defective Vehicles") manufactured, distributed, supplied, wholesaled and/or imported by Nissan.*

[45] **IDENTIFIES** the principle questions of fact and law to be treated collectively as the following:

a) Did class members purchase or lease a Nissan Versa vehicle, model year 2007-2012?

b) When did the class member purchase or lease such a vehicle?

c) At what date did any Nissan Defendant acquire knowledge of the existence of the issue raised in its November 2015 Recall Notice?

d) Does the issue described in the said Recall Notice constitute a defect within the meaning of the CPA?

e) Did any Nissan Defendant make false or misleading representations to a consumer or fail to mention an important fact in any representation made to a consumer, within the meaning of the CPA?

f) Did any Nissan Defendant commit a fault in relation to its recall program or otherwise fail to satisfy its obligations in that regard? Was it a voluntary undertaking within the meaning of section 272 CPA?

g) Did any Nissan Defendant fail to satisfy the requirements of sections 37, 38, 39, 220, 221 or 272 CPA?

h) Are class members entitled to:

   i. a reduction of their obligations and, if so, in what amount?

   ii. damages for trouble and inconvenience resulting from Nissan's misrepresentations and illegal practice and, if so, in what amount?

   iii. moral damages and, if so, in what amount?

   iv. punitive damages and, if so, in what amount?

[46] **IDENTIFIES** the conclusions sought by the class action to be instituted as being the following:

> *GRANT Plaintiff's action against Defendants on behalf of all the members of the Group;*
>
> *DECLARE the Defendants solidarily liable for the damages suffered by the Applicant and each of the members of the Group;*
>
> *CONDEMN the Defendants, solidarily, to pay to each member of the Group a sum to be determined in compensation of the damages suffered, and* ***ORDER*** *collective recovery of these sums;*
>
> *CONDEMN the Defendants, solidarily, to pay to each of the members of the Group punitive damages, in an amount to be determined, and ORDER collective recovery of these sums;*
>
> *CONDEMN the Defendants to pay interest and the 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;*
>
> *ORDER that the claims of individual Group members be the object of collective liquidation if the proof permits and alternately, by individual liquidation;*
>
> *CONDEMN the Defendants to bear the costs of the present action including the cost of notices, the cost of management of claims and the costs of experts, if any, including the costs of experts required to establish the amount of the collective recovery orders;*
>
> *RENDER any other order that this Honourable Court shall determine;*

[47] **DECLARES** that all members of the Class, unless they request exclusion in conformity with decisions by this Court, will be bound by any judgment to be rendered in the class action;

[48] **POSTPONES** the debate as to the content and conditions of the authorization notice and of the opting-out process and period to a future date convenient to the parties and the Court;

[49] **REFERS** the case to the Chief Justice of the Superior Court to determine the district in which the class action should be instituted and to designate the judge to manage and hear it;

[50] **DECLARES** that in the event that the Chief Justice determines that the class action is to be instituted in a district other than Montreal, the clerk is to forward the record to the clerk in that other district;

[51] **THE WHOLE** with legal costs to follow.

Gary D.D. Morrison, J.S.C.

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Date of Hearing : September 28, 2018