C A N A D A

PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL

(Class Action)
SUPERIOR COURT

No: 500-06-000839-171

FRANCIS LÉVESQUE

Applicant

v.

NISSAN CANADA INC.

-and-

NISSAN NORTH AMERICA, INC.

-and-

NISSAN MOTOR CO., LTD.

Defendants

PLAN OF ARGUMENT OF THE DEFENDANTS NISSAN CANADA INC. AND NISSAN NORTH AMERICA, INC. IN CONTESTATION OF THE APPLICATION FOR AUTHORIZATION TO INSTITUTE A CLASS ACTION

I. INTRODUCTION

2. By way of its *Application for Authorization to Institute a Class Action and to Appoint a Representative Plaintiff* (the "**Authorization Application**"), Francis Lévesque (the "**Plaintiff**"), seeks this Honourable Court's authorization to bring a class action against the Defendants Nissan Canada Inc., Nissan North America, Inc. and Nissan Motor Co., Ltd.

3. Only Defendants Nissan Canada Inc. and Nissan North America, Inc. (collectively hereinafter referred to as the "**Nissan Defendants**") were validly notified and subsequently filed an Answer to the Summons of the Authorization Application. The present plan of argument is therefore that of the Nissan Defendants only.

4. The Authorization Application advances a case for the authorization based on general, vague and unsupported allegations that the timing chain tensioning system of certain vehicles (the "**Timing Chain System**") is affected by a latent defect and equally unsupported allegations of the Nissan Defendant's negligence

relating to the alleged latent defect which in no way justify the conclusions sought.

5. Plaintiff alleges that the Timing Chain System on his second-hand, severely damaged ("véhicule gravement accidenté") 2005 Nissan Frontier purchased for $1,000 failed prematurely and he assumes, without any evidence whatsoever to form an arguable case, that he is not the only one in his unique situation.

6. The Authorization Application thus raises the following question: Can the Superior Court of Québec authorize a class action on the sole basis of general statements and the opinions and hypotheses of one person without any tangible evidence to form an arguable case?

7. The same authorities and recognized principles cited to this Court by the Plaintiff in support of the Authorization Application do not allow or condone such an arbitrary and unjust approach to authorizing a class action.

8. Simply put, the Plaintiff has not met his burden of proof to be authorized to institute a class action against the Nissan Defendants.

II. THE PROPOSED CLASS ACTION

9. On January 17, 2017, Plaintiff filed the Authorization Application on behalf of the following proposed class:

> "All persons in Quebec who own or have owned, or lease or have leased, one or more of the Subject Vehicles affected by the Timing Chain Tensioning System defect asserted by this claim.
>
> "Subject Vehicles" include: 2004-2008 Nissan Maxima vehicles, 2004-2009 Nissan Quest vehicles, 2004-2006 Nissan Altima vehicles (with the VQ35 engine), 2005-2007 Nissan Pathfinder vehicles, 2005-2007 Nissan Xterra vehicles, and 2005-2007 Nissan Frontier vehicles (with the VQ40 engine)" (the "**Proposed Class**").

10. Without presenting any specific or tangible supporting evidence whatsoever, Plaintiff alleges that Nissan represented in the maintenance schedules provided with the Subject Vehicles that the Timing Chain System is reasonably expected to last for the useful life of the Subject Vehicles without the need for repair or replacement.

- **Authorization Application, para. 14.**

11. Plaintiff further alleges that the Timing Chain System in all of the Subject Vehicles is prone to premature failure, that is, before the end of the useful life of the Subject Vehicles, and is thus affected by a latent and/or safety defect.

- **Authorization Application, para. 15.**

12. As a result, Plaintiff alleges that the Nissan Defendants have been negligent in failing to properly design and/or manufacture the Subject Vehicles, in failing to properly disclose the Timing Chain System's alleged defect and for failing to properly warn of the safety risks associated therewith.

- **Authorization Application, para. 28.**

13. In support of these general and vague allegations, Plaintiff files highly incomplete "maintenance schedules" (Exhibits P-4 to P-9) for six of the 23 Subject Vehicles included in the Proposed Class, none of which make any mention or any representation whatsoever regarding the Timing Chain System.

14. The only other exhibit filed which advances any detail at all is a "Technical Service Bulletin", which mentions a whining noise coming from the "timing chain area" or "secondary timing chain" (Exhibit P-10). However, Exhibit P-10 does not relate to all of the Subject Vehicles, including the Plaintiff's own vehicle, it provides absolutely no support for the alleged premature failure of the Plaintiff's' Timing Chain System or any defect or safety issues in respect thereto.

15. Indeed, a careful analysis of the Authorization Application reveals that no specific or tangible allegations or evidence are advanced with respect to an alleged defect of the Timing Chain System of any of the Subject Vehicles or any negligence on the part of the Nissan Defendants.

16. In an attempt to demonstrate a personal cause of action against the Nissan Defendants, the Plaintiff alleges the unique circumstances of the failure of the Timing Chain System on his 2005 Nissan Frontier, purchased second-hand on the website Kijiji.com for a total sum of $1,000 in the spring of 2014.

17. By his own admission, the Plaintiff's vehicle was previously severely damaged ("gravement accidenté") and "reconstructed" prior to his purchase and the eventual alleged failure of his Timing Chain System in the spring of 2015.

- **Authorization Application, para. 31.**

- **Exhibit N-1; Exhibit N-7, p. 13; Exhibit N-8, pp. 6-10, 37.**

18. In the Plaintiff's opinion, his unique situation is sufficient to demonstrate an arguable case of a latent defect in the Timing Chain System of all 23 of the Subject Vehicles, entitling all members of the Proposed Class to certain unquantified damages.

19. With respect, neither the general and unsupported allegations of the Authorization Application nor the allegations of the Plaintiff's unique situation establish an appearance of right or arguable case as required by the second paragraph of article 575 of the *Code of Civil Procedure*("**CCP**"), nor do they meet the requirements of article 575 (3) or (4) CCP.

III. AUTHORIZATION OF CLASS ACTION: GENERAL PRINCIPLES

20. In order to authorize a class action, the Court must be of the opinion that all criteria of article 575 CCP are satisfied.

- **Article 575 CCP**

> "The court authorizes the class action and appoints the class member it designates as representative plaintiff if it is of the opinion that
>
> (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."

21. These criteria are cumulative; the failure to meet one criterion is sufficient to dismiss the Authorization Application.

- ***Option Consommateurs v. Novopharm,* J.E. 2006-494 (S.C.) (Appeal dismissed (C.A., 2008-05-23), J.E. 2008-1173; Motion for leave to appeal to the Supreme Court of Canada dismissed (S.C. Can., 2008-12-04)), para. 71 [TAB 1]**

22. The Plaintiff bears the onus of adducing sufficient evidence to establish that the facts alleged satisfy the requirements of article 575 CCP. The Nissan Defendants do not bear any evidentiary onus to prove that the class action should not be authorized.

- ***Option Consommateurs v. Novopharm,* J.E. 2006-494 (S.C.) (Appeal dismissed (C.A., 2008-05-23), J.E. 2008-1173; Motion for leave to appeal to the Supreme Court of Canada dismissed (S.C. Can., 2008-12-04)), para. 73 [TAB 1]**

23. In so doing, the Plaintiff must demonstrate a *prima facie* case and can only be authorized to institute a class action if he has met his burden of establishing a serious appearance of right in light of the facts and the applicable law.

- ***Infineon Technologies AG v. Option consommateurs*, 2013 SCC 59, para. 65 [TAB 2]**

> "[65] As can be seen, the vocabulary may change from one case to another. But some well-established principles for the interpretation and application of art. 1003 of the C.C.P. can be drawn from the jurisprudence of this Court and of the Court of Appeal. First, as we mentioned above, the authorization process does not amount to a trial on the merits. It is a filtering mechanism. The applicant does not have to show that his claim will probably succeed. Also, the requirement that the applicant demonstrate a "good colour of right", an "apparence sérieuse de droit", or a "prima facie case" implies that although the claim may in fact ultimately fail, the action should be allowed to proceed if the applicant has an arguable case in light of the facts and the applicable law." (Our underlining)

24. Although the Plaintiff's burden of proof may be a low one at the authorization stage, he must nonetheless satisfy the Court that his personal cause (or causes) of action is supported by the necessary allegations of fact.

- ***Fortier v. Meubles Léon ltée*, 2014 QCCA 195, paras. 68-69 [TAB 3]**

> "[68] Le législateur a, il est vrai, assujetti le recours collectif à un mécanisme de filtrage. Si la Cour suprême n'a pas abaissé les seuils légal ou de preuve pour satisfaire aux exigences de cette disposition, elle ne les a pas non plus relevés. Que ces seuils soient peu élevés, ils doivent néanmoins être franchis.
>
> [69] Le juge autorisateur doit adopter, il est vrai, une démarche analytique souple, mais encore faut-il que les allégations de la requête ne participent pas uniquement de généralités. En effet, plus l'allégation est générale, moins les faits ressortent, et plus on court le risque de se rapprocher davantage de l'opinion. Bref, les allégations de fait doivent être suffisamment précises de manière à soutenir efficacement la reconnaissance du droit revendiqué et ainsi permettre au juge autorisateur d'en apprécier la suffisance." (Our underlining)

- ***Harmegnies v. Toyota Canada inv.*, 2008 QCCA 380, Leave to appeal to the Supreme Court of Canada denied, para. 44 [TAB 4]**

25. Indeed, in order to establish a serious appearance of right or an arguable case, the Plaintiff is required to state the precise facts on which it is based. Vague, general or imprecise facts are not assumed to be true and are not sufficient to justify the conclusions sought.

- ***Infineon Technologies AG v. Option consommateurs*, 2013 SCC 59, para. 67 [TAB 2]**

> "[67] At the authorization stage, the facts alleged in the applicant's motion are assumed to be true. The applicant's burden at this stage is to establish an arguable case, although the factual allegations cannot be [translation] "vague, general [or] imprecise" (see *Harmegnies* c. *Toyota Canada inc.*, 2008 QCCA 380 (CanLII), at para. 44)."

- ***Vignola c. Chrysler Canada ltée* [1984] R.D.J. 327 (C.A.), p. 5 [TAB 5]**

> "On a déjà décidé que la requête en autorisation d'exercer le recours collectif doit faire voir au tribunal «une apparence sérieuse de droit». Il va de soi que cette requête, complétée «par affidavit» et précisée ou corrigée par le témoignage du requérant lui-même, doit également faire voir une apparence sérieuse des faits essentiels qui sont une condition sine qua non du droit au recours collectif. Se contenter d'une vague possibilité que ces faits essentiels existent, plutôt que d'une apparence sérieuse de leur existence, inviterait les justiciables à abuser de la procédure exceptionnelle du recours collectif." (Our underlining)

26. Moreover, alleged facts which constitute opinion or which are based on mere speculation or hypotheses are not deemed to be true and cannot be relied on by the Court in determining whether the Plaintiff's legal syllogism has a serious appearance of right.

- ***Option consommateurs c. Bell Mobilité*, 2008 QCCA 2201, para. 38, [TAB 6]**

> "[38] Au stade de l'autorisation, le juge doit élaguer le texte de la requête des éléments qui relèvent de l'opinion, de l'argumentation juridique, des inférences ou hypothèses non vérifiées ou encore qui sont carrément contredites par une preuve documentaire fiable."

27. Bare allegations or mere assertions of fact must necessarily be supported by some evidence or factual underpinning to form an arguable case.

- ***Infineon Technologies AG c. Option consommateurs*, 2013 SCC 59, para. 134 [TAB 2]**

> "[134] On their own, these bare allegations would be insufficient to meet the threshold requirement of an arguable case. Although that threshold is a relatively low bar, mere assertions are insufficient without some form of factual underpinning. As we mentioned above, an applicant's allegations of fact are assumed to be true. But they must be accompanied by some evidence to form an arguable case. (…)" (Our underlining)

28. The Court must therefore consider and examine the evidence filed by the Plaintiff in order to determine if the alleged facts are more than unsupported statements, hypotheses or speculation and indeed demonstrate an arguable case for the conclusions sought against the Nissan Defendants.

- ***Asselin c. Desjardins Cabinet de services financiers inc*., 2017 QCCA 1673, application for leave to appeal to the Supreme Court to Canada pending, para. 41 [TAB 7]**

- ***Tonnelier c. Québec (Procureur général)*, 2012 QCCA 1654, para. 59, [TAB 8]**

  "[59] La Cour a maintes fois réitéré ce principe. Une apparence sérieuse de droit repose généralement sur des allégations sérieuses qui *prima facie* semblent bien fondées. Cette exigence ou norme ne sera toutefois pas satisfaite si la réclamation repose sur des allégations qui s'avèrent mensongères ou qui paraissent manifestement mal fondées en prenant connaissance d'une preuve positive au contraire." (Our underlining)

29. The allegations of fact which are contradicted by the adduced evidence, such as examinations, or which are non-plausible in consideration of the other evidence, are not deemed to be true.

- ***Marandola c. Fédération des Caisses Desjardins du Québec et al*., J.E. 2007-605 (S.C.) (appeal dismissed (C.A., 2007-06-18), J.E. 2007-1555), para. 28 [TAB 9]**

  "[28] Dans le cadre de l'évaluation de l'apparence sérieuse de droit, les allégations de faits ne peuvent être tenues pour avérées si elles sont contredites par d'autres éléments de preuve du dossier ou encore que ces allégations semblent invraisemblables ou non plausibles."

30. In the present case, as will be detailed further below, the allegations against the Nissan Defendants are vague and unverified inferences or hypotheses without any factual basis, which must on their own result in the dismissal of the Authorization Application.

31. Even more though, the Plaintiff has advanced an especially unique case without alleging any facts which might suggest that he is not alone in his very particular situation. He has thus not only failed to demonstrate a personal cause of action against the Nissan Defendants, but has also failed to demonstrate the existence of a class.

32. The case law requires that the Plaintiff take certain steps to demonstrate that he is not alone in his situation. Indeed, the judge hearing the application for authorization requires a minimum of information on the size and essential

characteristics of the class concerned in order to assess whether the third criteria of article 575 CPC has been met.

- ***Lévesque c. Vidéotron, s.e.n.c.,* 2015 QCCA 205, para. 26 [TAB 10]**

  "[26] Il est exact de dire que, généralement, une personne qui veut se voir reconnaître le statut de représentant d'un groupe ne peut se contenter de présenter son seul dossier pour obtenir l'autorisation d'exercer un recours collectif. Elle doit effectuer certaines démarches qui lui permettront de démontrer qu'elle n'est pas seule dans sa situation et que plusieurs autres personnes démontrent un intérêt à poursuivre. En bref, elle doit démontrer l'existence d'un véritable groupe. En effet, le juge saisi de la demande d'autorisation a besoin d'un minimum d'informations sur la taille et les caractéristiques essentielles du groupe visé pour évaluer le respect du paragraphe 1003 c) C.p.c.. De plus, il a souvent besoin de précisions pour évaluer l'insatisfaction des membres du groupe et la pertinence de recourir à l'action collective." (Our underlining)

33. If, however, it is evident that there is a significant number of consumers who find themselves in an identical situation, it becomes less useful to try to identify them.

- ***Lévesque c. Vidéotron, s.e.n.c.,* 2015 QCCA 205, para. 27 [TAB 10]**

  "[27] Toutefois, le niveau de recherche que doit effectuer un requérant dépend essentiellement de la nature du recours qu'il entend entreprendre et de ses caractéristiques. Si, de toute évidence, il y a un nombre important de consommateurs qui se retrouvent dans une situation identique, il devient moins utile de tenter de les identifier. Il est alors permis de tirer certaines inférences de la situation." (Our underlining)

34. This said, mere allegations of a defect affecting other vehicles and class members suffering damages as a result, without any specifics facts to support those allegations, are not sufficient to establish the existence of a class.

- ***Hébert c. KIA Canada inc.,* 2014 QCCS 3968, confirmed on appeal 2015 QCCA 1911, paras. 20, 33, 42-45 [TAB 11]**

  "[20] Pour qu'un recours collectif soit autorisé, encore faut-il qu'un groupe de personnes soit aux prises avec les mêmes problèmes. Sur cette question, M. Hébert allègue qu'il n'est pas le seul à subir des inconvénients en raison de la technologie Bluetooth. Il formule plusieurs allégations qui méritent d'être analysées séparément.

  […]

> ***• 2.18 De plus, la constatation du requérant était claire. Sa voiture n'était pas la seule défectueuse;***
>
> [33] Il s'agit d'une allégation générale qui n'établit pas l'existence d'un groupe.
>
> […]
>
> [42] Au contraire, comme on l'a vu précédemment, il existe une présomption de faits qui tend à démontrer que les problèmes de M. Hébert sont propres à lui compte tenu qu'il n'a pas été en mesure d'identifier un seul autre propriétaire ou locataire au Québec d'une voiture KIA aux prises avec un des problèmes qu'il a identifiés alors qu'il allègue que plus de 77 000 véhicules sont équipés avec le même système.
>
> [43] La présente situation n'est pas sans rappeler l'affaire *F.L.* c. *Astrazeneca Pharmaceuticals, p.l.c.* où les représentants alléguaient que chacun des membres du groupe avait subi des dommages. Pourtant, ils n'avaient parlé ni rencontré aucun autre membre. Le tribunal conclut que ces affirmations ne sont basées sur aucun fait.
>
> [44] Il incombait à M. Hébert d'alléguer des faits suffisants pour justifier l'autorisation du recours. Il ne pouvait s'en remettre à de simples spéculations ou hypothèses. Les carences de son enquête empêchent de déterminer s'il existe un groupe.
>
> [45] En conclusion, il serait contraire à une saine administration de la justice que les parties aient à investir dans des expertises complexes pour déterminer la cause des problèmes allégués par M. Hébert non seulement pour ses deux véhicules et ses deux téléphones cellulaires mais également pour tous les autres modèles de KIA et les autres téléphones cellulaires disponibles sur le marché. On voit aisément que ces expertises seraient longues et coûteuses, ce qui ne doit pas être autorisé en l'absence d'un groupe." (Our underlining)

35. It should be recalled that at the authorization stage, the Court must examine the personal and specific situation and recourse of the proposed class representative in order to determine whether the conditions of article 575 CCP are met. If his situation corresponds to a unique situation which fails to establish an appearance of right or arguable case, the authorization of the class action must be refused.

- ***Lorrain c. Petro-Canada*, 2013 QCCA 332, paras. 94-95 [TAB 12]**
- ***Union des consommateurs c. Bell Canada*, 2010 QCCA 351, paras. 34-37 [TAB 13]**

- ***Contat v. General Motors du Canada ltée,* 2009 QCCA 1699, para. 33 (Motion for leave to appeal to the Supreme Court of Canada dismissed (C.S. Can., 2010-01-28)) [TAB 16]**

36. For the reasons explained in greater detail below, the Plaintiff has failed to satisfy the criteria enunciated at article 575 CCP in that:

a) The facts alleged in the Authorization Application do not justify the conclusions sought;

b) The Plaintiff has failed to take any steps to identify any class members or to demonstrate the existence of a class; and

c) The Plaintiff is not an adequate representative for the Proposed Class.

IV. THE PLAINTIFF HAS NOT MADE OUT AN ARGUABLE CASE (ARTICLE 575 (2) CCP)

37. The Authorization Application advances allegations of a latent defect of the Timing Chain System in the Subject Vehicles and related alleged negligence on the part of Nissan Defendants for failure to properly design and/or manufacture the Subject Vehicles equipped with a Timing Chain System, for failure to repair or provide a recall solution to the alleged defect and for failure to properly disclose the defect and to warn of the safety risks associated with them, all of which would have caused certain unquantified damages to the Proposed Class. These are the so-called legal bases advanced by the Plaintiff.

38. As mentioned, in order to meet the requirements of article 575 (2) CCP, the Plaintiff has the burden to demonstrate a serious appearance of right or arguable case with respect to the legal bases identified in the Authorization Application.

- ***Infineon Technologies AG v. Option consommateurs*, 2013 SCC 59, para. 65 [TAB 2]**

- ***Vignola c. Chrysler Canada ltée* [1984] R.D.J. 327 (C.A.), p. 5 [TAB 5]**

> "On a déjà décidé que la requête en autorisation d'exercer le recours collectif doit faire voir au tribunal «une apparence sérieuse de droit». Il va de soi que cette requête, complétée «par affidavit» et précisée ou corrigée par le témoignage du requérant lui-même, doit également faire voir une apparence sérieuse des faits essentiels qui sont une condition sine qua non du droit au recours collectif. Se contenter d'une vague possibilité que ces faits essentiels existent, plutôt que d'une apparence sérieuse de leur existence, inviterait les justiciables à abuser de la procédure exceptionnelle du recours collectif." (Our underlining)

39. Moreover, and when faced with allegations of a latent defect or an alleged security risk, such as in the present case, the Court cannot rely on the Plaintiff's own opinions or personal conclusions to establish a serious appearance of right or arguable case.

- ***Durand c. Dermatech*, 2009 QCCS 3874, paras. 77, 80, 86-89 [TAB 14]**

> "[77] La requête doit faire état de faits suffisamment précis pour permettre au Tribunal de vérifier si les conditions d'ouverture du recours sont rencontrées. Le syllogisme juridique doit y être apparemment sérieux.
>
> […]
>
> [80] Elle semble considérer que son opinion, ses conclusions personnelles sont suffisantes pour établir, prima facie, une apparence sérieuse de droit.
>
> [81] Elle ne réfère à aucun fait particulier pour établir la nocivité ou dangerosité des produits non plus qu'à quelque élément indiquant que ces produits pourraient présenter des risques « graves » ou « sévères » de formation de granulomes et nodules.
>
> […]
>
> [86] Doris Durand allègue des circonstances qui lui sont propres. Elle allègue des faits qui, à son avis, donneraient ouverture à un recours de chaque membre du groupe. Elle adresse des reproches aux intimés.
>
> [87] Mais rien, rien ne permet de comprendre, encore moins de démontrer sérieusement, quelque lien entre les faits et les reproches allégués.
>
> [88] Au chapitre de la faute, Doris Durand devait alléguer des faits particuliers et des circonstances spécifiques qui auraient permis de juger du sérieux de ses prétentions.
>
> [89] Tel n'est pas le cas ici." (Our underlining)

A. No Arguable Case of a Latent Defect

40. The allegations in support of the claim of a latent defect in the Timing Chain System of the Subject Vehicles are summarized at paragraphs 13 to 15 of the Authorization Application:

> "13. Nissan maintenance schedules do not require maintenance or replacement of the Timing Chain Tensioning Systems, as it appears in a copy of the maintenance schedules for the following

models: 2004 Altima (with the VQ35 engine) communicated here as **Exhibit P-4**, 2005 Maxima communicated here as **Exhibit P-5**, 2006 Quest communicated here as **Exhibit P-6**, 2006 Xterra communicated here as **Exhibit P-7,** 2007 Pathfinder communicated here as **Exhibit P- 8,** and 2005 Frontier (with the VQ40 engine) communicated here as **Exhibit P-9;**

14. Based on Defendants representations in the maintenance schedules provided with the Subject Vehicles, the Timing Chain Tensioning System is reasonably expected to last for the useful life of the engine without the need for repair or replacement

15. However, the Timing Chain Tensioning System in the Subject Vehicles is prone to premature failure that is, before the end of the useful life of the vehicles, well before consumers reasonably expect any such failure to occur, and cannot be reasonably repaired." (Our underlining)

41. As detailed below, these allegations are general and unsupported assertions which constitute opinion, are based on mere speculation and hypotheses and cannot be relied on by this Honourable Court in determining whether the Plaintiff's legal syllogism has a serious appearance of right.

42. Indeed, in support of the assertion that the Timing Chain System in the Subject Vehicles is defective and "prone to premature failure before the end of the useful life of the vehicles," the Plaintiff files extracts of "maintenance schedules" relating to only six of the 23 Subject Vehicles included in the Proposed Class, namely:

- **Exhibit P-4**: An extract from the website www.nissan.ca regarding the maintenance schedule for the 2004 Nissan Altima, which seemingly indicates "current service" at 168,000 kilometers as well as "previous service" at 162,000 kilometres and "next service" at 174,000 kilometres and indicates certain servicing recommendations to take place at those mileages, including to "replace engine oil and filter, rotate tires, replace spark plugs etc."

- **Exhibit P-5**: An extract from the website www.nissan.ca regarding the maintenance schedule for the 2005 Nissan Maxima, which seemingly indicates "current service" at 156,000 kilometers as well as "previous service" at 150,000 kilometres and "next service" at 162,000 kilometers and indicates certain servicing recommendations to take place at those mileages, including to "replace engine oil and filter, rotate tires, inspect all lights etc."

- **Exhibit P-6**: An extract from the website www.nissan.ca regarding the maintenance schedule for the 2006 Nissan Quest, which seemingly indicates "current service" at 144,000 kilometers as well as "previous service" at 138,000 kilometres and "next service" at 150,000 kilometers

and indicates certain servicing recommendations to take place at those mileages, including to "replace engine oil and filter, rotate tires, replace engine air filter etc."

- **Exhibit P-7**: An extract from the website www.nissan.ca regarding the maintenance schedule for the 2006 Nissan Xterra, which seemingly indicates "current service" at 144,000 kilometers as well as "previous service" at 138,000 kilometres and "next service" at 150,000 kilometres and indicates certain servicing recommendations to take place at those mileages, including to "replace engine oil and filter, rotate tires, replace differential oil etc."

- **Exhibit P-8**: An extract from the website www.nissan.ca regarding the maintenance schedule for the 2007 Nissan Pathfinder, which seemingly indicates mileage of 132,000 kilometers but provides no further detail on servicing recommendations at all.

- **Exhibit P-9**: An extract from the website www.nissan.ca regarding the maintenance schedule for the 2005 Nissan Frontier, which seemingly indicates "current service" at 156,000 kilometers as well as "previous service" at 150,000 kilometres and "next service" at 162,000 kilometers and indicates certain servicing recommendations to take place at those mileages, including to "replace engine oil and filter, rotate tires, inspect all lights etc."

43. An analysis of Exhibits P-4 to P-9 demonstrates that:

a) Only six of the 23 Subject Vehicles are even mentioned by the Exhibits P-4 to P-9;

b) Of the six Subject Vehicles mentioned in Exhibits P-4 to P-9, there is no "representation" that the Timing Chain System is "reasonably expected to last for the useful life of the engine without the need for repair or replacement," or any representation, let alone mention, whatsoever regarding the Timing Chain System at all; and

c) The website extracts or "maintenance schedules" (Exhibits P-4 to P-9) do not contain any information regarding maintenance or servicing of any of the Subject Vehicles from 0 to 132,000 kilometers or after 174,000 kilometers.

44. It is evident that the selective, inadequate and incomplete supporting evidence filed by the Plaintiff in no way supports the conclusory allegations that the Nissan Defendant's maintenance schedules for the Subject Vehicles "do not require maintenance or replacement of the Timing Chain Tensioning Systems," or that the so-called "representations" somehow lead to the conclusion that "the Timing Chain Tensioning System is reasonably expected to last for the useful life of the engine without the need for repair or replacement."

45. In fact, Exhibits P-4 to P-9 establish quite the opposite. They demonstrate rather that the Nissan Defendant's made no representations at all regarding the Timing Chain System for six of the 23 Subject Vehicles included in the Proposed Class at the specific mileages (between 132,000 and 174,000 for certain of the six Subject Vehicles).

46. The inescapable conclusion is that these allegations cannot be taken as true. They are general and unsupported assertions which constitute opinion and cannot be relied upon. In any event, even if taken as true, they in no way support or demonstrate an arguable case of a latent defect or any premature degradation in the Timing Chain System of any of the Subject Vehicles, let alone the Plaintiff's vehicle.

47. As already mentioned, the analysis of the authorization criteria, including that of article 575 (2) CCP, must be carried out from the personal situation of the representative Plaintiff.

48. The Plaintiff alleges that his vehicle had an approximate mileage of 120 000 kilometers when the Timing Chain System allegedly failed prematurely, yet none of the evidence filed by the Plaintiff demonstrates or supports any representation by the Nissan Defendants regarding maintenance or servicing of the Timing Chain System or otherwise mentions the Timing Chain in the Plaintiff's vehicle at all.

- **Authorization Application, para. 35.**

49. Indeed, Plaintiff files an extract from the website www.nissan.ca regarding the "maintenance schedule" for a 2005 Nissan Frontier, but only for mileages that far surpass his own vehicle's mileage of 120,000 kilometres, notably for 150,000 to 162,000 kilometres which are in no way relevant or support any allegation of the useful life of Timing Chain System or of any defect or premature degradation of the Timing Chain System.

50. Moreover, the evidence reveals that when the Plaintiff bought his second-hand vehicle, he did not even bother to ask the previous owner for the maintenance log of the vehicle in order to determine the maintenance history of the vehicle, which remains unknown.

- **Exhibit N-7, p. 21:**

  "Puis il y a un document, là, en français ça s'appelle «Livret d'entretien ou registre des rendez-vous de service». En anglais, ça s'appelle «Maintenance Log». La voiture vient avec ça.

  R- Um-hum.

> Q- Le camion vient avec ça. Est-ce que vous avez demandé d'avoir le livret d'entretien ou le registre des rendez-vous de service, en Anglais «Maintenance Log»?
>
> R- Non, j'ai pas demandé.
>
> Q- Ce n'était pas avec le véhicule, ça ne vous est pas venu avec?
>
> R- Non."

51. Even if taken as true, which as explained cannot be done in this case, the allegations in no way establish an arguable case of a latent defect, let alone seriously demonstrate any link between the facts and the alleged accusations that the Timing Chain System in the Subject Vehicles is prone to premature failure.

52. In a futile and desperate effort to lend some support to the otherwise bare allegations and speculation regarding the alleged defect of the Timing Chain System in the Subject Vehicles, Plaintiff further alleges at paragraph 19 of the Authorization Application that the Nissan Defendants undertook affirmative efforts to conceal the failures through:

a) "Not mentioning any need to replace the Timing Chain Tensioning System or any of its components in their maintenance schedules;

b) Technical Service Bulletins ("**TSBs**") issued to repair facilities; and

c) by giving "goodwill" adjustments to reduce the costs of repairs for some customers who complained, but failing to do so for other customers who did not complain."

- **Authorization Application, para. 19**

53. Once again, however, it is evident that these statements are bare assertions not supported by any evidence and which cannot be deemed to be true for the purposes of determining if there is an arguable case of a latent defect.

54. Indeed, for the reasons already explained, the statement in paragraph 19 a) of the Authorization Application is baseless and unsupported by the evidence filed by Plaintiff. The very same can be said of the statement in paragraph 19 c) of the Authorization Application, which amounts to a vague, general and bare assertion unsupported by any evidence at all.

55. Plaintiff has failed to provide any support or adduce any evidence whatsoever regarding the alleged "goodwill" adjustments made by the Nissan Defendant's to reduce the costs of repairs for some customers who complained or their failure to do the same for those who did not complain.

56. The vague assertion in paragraph 19 c) of the Authorization Application fails to explain what goodwill adjustments were made, for which repairs, with respect to which vehicles, further to what complaints or even to which customers these "goodwill adjustments" were given or not given. Indeed, we do not even know if the customers referred to are members of the Proposed Class.

57. As explained, on their own, these bare allegations are insufficient to meet the threshold requirement of an arguable case established by the Supreme Court of Canada in *Infineon Technologies*. Such assertions are insufficient without some form of factual underpinning. In the present case, the Plaintiff offers none.

- ***Infineon Technologies AG c. Option consommateurs*, 2013 SCC 59, para. 134 [TAB 2]**

> "[134] On their own, these bare allegations would be insufficient to meet the threshold requirement of an arguable case. Although that threshold is a relatively low bar, mere assertions are insufficient without some form of factual underpinning. As we mentioned above, an applicant's allegations of fact are assumed to be true. But they must be accompanied by some evidence to form an arguable case. (…)" (Our underlining)

58. Concerning the statement in paragraph 19 b) of the Authorization Application that the TSBs allegedly issued by the Nissan Defendants to repair facilities or to Nissan dealerships, once again Plaintiff advances unsupported and patently false assertions which cannot be taken as true and which fail to demonstrate an arguable case of a latent defect of the Timing Chain System.

59. Plaintiff alleges that: "Nissan chose to issue multiple TSBs to Nissan dealerships, beginning on or around July 2007, informing them that it was necessary to replace certain elements of the Timing Chain Tensioning System, as seen for example in TSB Reference No. NTB07-042c entitled "Buzzing/Whining Noise from Timing Chain Area," communicated herein as Exhibit P-10. However, Nissan did not inform consumers about the TSBs."

- **Authorization Application, para. 21**

60. In support of this allegation, Plaintiff has filed one document entitled "Technical Bulletin" dated December 14, 2009 (Exhibit P-10), concerning the following vehicles:

a) 2004-2008 Maxima (A34);

b) 2004-2006 Altima (L31) with VQ35 engine ONLY; and

c) 2004-2009 Quest (V42).

61. Exhibit P-10 indicates that if there is a “high frequency buzzing/whining noise coming from the secondary timing chain system”, and if the noise increases with engine speed with respect only to the vehicles listed (2004-2008 Maxima, 2004-2006 Altima (L31) with VQ35 engine and 2004-2009 Quest), then the action to be taken is to replace “both the secondary timing chains and both secondary timing chain tensioner “shoes” (…).”

- **Exhibit P-10, p. 1 of 5.**

62. An analysis of Exhibit P-10 demonstrates that:

a) The TSB is dated December 14, 2009;

b) Only the following vehicles are concerned: 2004-2008 Maxima(A34), 2004-2006 Altima (L31) with VQ35 engine and 2004-2009 Quest(V42);

c) The following Subject Vehicles are <u>not</u> concerned by Exhibit P-10: 2005 - 2017 Nissan pathfinder vehicles, 2005-2007 Nissan Xterra vehicles and 2005-207 Nissan Frontier vehicles, <u>including Plaintiff’s own vehicle, a 2005 Nissan Frontier</u>;

d) The technical bulletin concerns only the secondary timing chain system;

e) There is no indication or representation whatsoever of any premature degradation or defect of the Timing Chain System; and

f) There is no indication or representation regarding any potential safety issue or concerns.

63. Once again, despite the Plaintiff’s efforts to find any supporting evidence for his speculative hypotheses regarding the latent defect of the Timing Chain System of the Subject Vehicles or related safety issues, Exhibit P-10 provides absolutely no factual underpinning for such allegations and in no way demonstrates an arguable case for Plaintiffs proposed legal syllogism surrounding an alleged latent or safety defect.

64. In fact, Exhibit P-10 serves to confirm that the Plaintiff’s allegations that the Nissan Defendants knew of the potential safety concerns associated with the Timing Chain System, as it issued <u>multiple</u> TSBs to Nissan Dealerships beginning in 2007, are general assertions amounting to unsupported and ill-founded hypotheses.

65. These allegations cannot be taken as true by this Honourable Court.

66. According to Plaintiff, the fact that the Timing Chain System is prone to sudden premature failure (and is thus defective), presents a serious safety issue to consumers and places the driver and passengers at a risk of harm because it

can cause a variety of problems, including the inability of accelerate, maintain speed and could even result in possible collisions or other accidents.

- **Authorization Application, paras. 16 and 24.**

67. No supporting evidence at all is filed by the Plaintiff in support of any of these safety related allegations. These allegations are thus nothing more than generalized statements or opinions about the possible impact of a defective Timing Chain System.

68. There is no allegation in the Authorization Application that any of the members of the Proposed Class, or even the Plaintiff himself, experienced any such safety issues.

69. Indeed, the few facts alleged to support the Plaintiff's personal cause of action against the Nissan Defendants likewise fail to demonstrate any arguable case for the legal syllogism of a latent defect causing safety issues or damages.

70. It is important to recall the unique, personal situation alleged by the Plaintiff in support of his recourse against the Nissan Defendants:

a) He purchased a second-hand 2005 Nissan Frontier on the website Kijiji in the spring of 2014;

b) He paid a total a sum of $1,000 for his vehicle;

c) His vehicle was previously severely damaged ("véhicule gravement accidenté") and "reconstructed" prior to his purchase;

d) The eventual alleged failure of the Timing Chain System of his vehicle was something that "he observed" further to a "loud banging noise coming from the engine of his vehicle" in the spring of 2015 and which occurred some 10 years after the car was manufactured;

e) At the time of the alleged failure, the Plaintiff's vehicle had an approximate mileage of 120,000 kilometers.

- **Authorization Application, para. 31.**

- **Exhibit N-1; Exhibit N-7, pp. 13; Exhibit N-8, pp. 6-10, 37.**

71. By his own admission, the Plaintiff was not at all concerned with the fact that his vehicle was severely damaged and reconstructed prior to purchase and made no effort to ask further questions to the seller or anyone else about the vehicle's safety or to inquire if this might have had an impact on the Timing Chain System of his vehicle.

- **Exhibit N-8, pp. 7-8.**

> "R. Les seuls détails qu'il m'a dit, c'est que quand lui, il l'avait acheté, il était accidenté, puis qu'il l'a fait réparer. C'est le seul détail que j'ai, mais je n'ai pas eu en avant, sur le côté, je n'ai aucune idée où l'accident est arrivé.
>
> Q. [20] Et pourquoi vous avez dit tantôt que ça ne vous dérangeait pas qu'il avait été accidenté ou quoi que ce soit, pourquoi est-ce que ça ne vous dérangeait pas?
>
> R. Ça ne me dérange pas parce que l'auto, ça arrive souvent qu'il y a des véhicules qui sont accidentés, puis des fois c'est un petit accident banal puis qui fait que... peut-être que la diminution de la valeur du véhicule, elle baisse un peu, mais moi, ça ne me dérangeait pas, personnellement.
>
> Q. [21] Que la valeur baisse un petit peu, ça ne vous dérangeait pas?
>
> R. Non.
>
> Q. [22] Vous l'avez acheté à combien?
>
> R. C'était mille dollars (1 000 $).
>
> Q. [23] Donc, ça ne diminue pas, ce n'était pas très grave?
>
> R. C'est ça,"

72. Moreover, it appears that following the alleged failure of his Timing Chain System in 2015, the Plaintiff was no more concerned or interested in determining if any other individuals might have experienced a similar issue with any of the Subject Vehicles or if they might have experienced any safety issues or damages.

73. When both the factual allegations and the exhibits in the Authorization Application are carefully considered together, it is clear that the Plaintiff has not met his burden of proof to demonstrate an arguable case against the Nissan Defendants for any alleged defect of the Timing Chain System.

74. The Plaintiff seems to wrongly assume that his opinions, personal hypotheses and conclusions regarding the Timing Chain System of the Subject Vehicles are sufficient to establish a serious appearance of right. They are not.

- ***Durand c. Dermatech*, 2009 QCCS 3874, paras. 77, 80-83, 86-89 [TAB 14]**

  > "[77] La requête doit faire état de faits suffisamment précis pour permettre au Tribunal de vérifier si les conditions d'ouverture du recours sont rencontrées. Le syllogisme juridique doit y être apparemment sérieux.

[…]

[80] Elle semble considérer que son opinion, ses conclusions personnelles sont suffisantes pour établir, prima facie, une apparence sérieuse de droit.

[81] Elle ne réfère à aucun fait particulier pour établir la nocivité ou dangerosité des produits non plus qu'à quelque élément indiquant que ces produits pourraient présenter des risques « graves » ou « sévères » de formation de granulomes et nodules.

[82] Doris Durand ne fait référence à aucune étude scientifique, aucun rapport d'expertise, aucun communiqué ou article, aucune statistique, rien qui permettrait de connaître, ou du moins de soupçonner, les éléments de dangerosité, les effets nocifs ou le défaut de sécurité des produits visés.

[83] L'analyse des reproches adressés aux intimés alléguant un « produit nocif » et des « effets secondaires graves » ne précisent pas le type d'effets secondaires dont il s'agit, ni même s'il s'agit de « réactions de type granulaire et nodulaire ».

[…]

[86] Doris Durand allègue des circonstances qui lui sont propres. Elle allègue des faits qui, à son avis, donneraient ouverture à un recours de chaque membre du groupe. Elle adresse des reproches aux intimés.

[87] Mais rien, rien ne permet de comprendre, encore moins de démontrer sérieusement, quelque lien entre les faits et les reproches allégués.

[88] Au chapitre de la faute, Doris Durand devait alléguer des faits particuliers et des circonstances spécifiques qui auraient permis de juger du sérieux de ses prétentions.

- ***Lebrasseur c. Hoffmann-La Roche ltée*, 2013 QCCS 3024, paras. 28, 30-31 [TAB 15]**

"[28] Conclure autrement signifierait qu'un recours collectif pourrait être exercé contre le fabricant d'un médicament pour dangerosité du produit ou défaut d'information sur la seule base qu'un consommateur souffre d'une des « réactions indésirables » identifiées à la monographie, ce qui ne peut être le cas. Et ce, d'autant plus qu'en l'espèce, Santé Canada permet toujours la vente du médicament Accutane au Canada, que la monographie de ce médicament est sensiblement demeurée la même depuis 1983

> et qu'il n'existe aucune allégation voulant que Santé Canada revoit actuellement le maintien de cette autorisation ou que Roche est en voie de modifier le contenu de la monographie. M. Lebrasseur n'allègue pas non plus les raisons pour lesquelles le produit a été retiré du marché américain.
>
> [30] Ainsi, l'allégation de M. Lebrasseur voulant qu'une telle relation existe n'est que pure hypothèse ou soupçon. Il en est de même quant à la dangerosité du médicament et au défaut d'information de Roche.
>
> [31] Contrairement à ce que plaide M. Lebrasseur, il ne peut se contenter d'alléguer sa théorie de la cause (fautes, préjudice et lien de causalité) pour ainsi avoir la possibilité de tenter d'établir dans le cadre d'une audience au fond les fautes reprochées à Roche par une preuve à être obtenue et dont il ignore la teneur à l'heure actuelle. Procéder ainsi viderait de son sens la condition énoncée au paragraphe 1003 b) C.p.c., en plus d'être contraire à la règle de la proportionnalité de l'article 4.2 C.p.c." (Our underlining)

75. The Plaintiff alleges circumstances which are his own and unique. He alleges facts that, in his opinion, give rise to a remedy for each member of the Proposed Class, but none of the allegations or exhibits in the Authorization Application makes it possible to understand, let alone to seriously demonstrate, any link between the facts he alleges and the alleged defect of the Timing Chain System of the Subject Vehicles.

76. In short, the Plaintiff advances no serious appearance of right of a latent defect affecting the Timing Chain System of the Subject Vehicles and the Authorization must be dismissed for this reason alone.

B. NO ARGUABLE CASE OF ANY NEGLIGENCE

77. Plaintiff then goes on to allege, in only one paragraph and with no supporting evidence at all, that the Nissan Defendants were negligent through the following acts or omissions:

a) "Failure to properly and adequately design and/or manufacture Nissan vehicles equipped with a Timing Chain Tensioning System, components, and parts thereof;

b) Failure to properly and adequately disclose the Timing Chain Tensioning System defect to potential and present customers of the affected vehicles;

c) Premature failure is also material to consumers because there is no safe alternative way for owners to avoid the risk of potential harm;

d) Failure to properly and adequately warn potential and present customers of the safety risks of using vehicles equipped with the Timing Chain Tensioning System."

- **Authorization Application, para. 28**

78. As discussed above, the allegation of Nissan Defendants' failure to properly disclose a potential and alleged latent defect (premature degradation of the Timing Chain System in the Subject Vehicles) and related supposed safety risks are bare assertions not supported by and/or are plainly contradicted by the evidence filed by the Plaintiff, contrary to requirements established by the Supreme Court of Canada in *Infineon Technologies* to demonstrate a serious appearance of right.

79. It is thus abundantly clear that the Plaintiff has not met his burden of proof to demonstrate an arguable case as required by article 575 (2) CCP with respect to any alleged negligence by the Nissan Defendants.

80. The Superior Court of Québec cannot authorize a class action on the basis of general statements, without any tangible evidence, based solely on the unique situation of the Plaintiff which demonstrates no cause of action against the Nissan Defendants.

V. ABSENCE OF A CLASS AND OF PROPER REPRESENTATION OF THE MEMBERS OF THE PROPOSED CLASS (575 (3) AND 575 (4) CCP)

A. PLAINTIFF HAS FAILED TO DEMONSTRATE THE EXISTENCE OF A CLASS (575 (3) CCP)

81. As the Court of Appeal has reiterated on numerous occasions, at the authorization stage, the Court must examine the personal and specific situation of the proposed class representative. If the situation of the proposed class representative corresponds to a unique case and he has taken no steps to demonstrate that his is not alone in his situation, the authorization to exercise the class action cannot be granted.

- ***Lévesque c. Vidéotron, s.e.n.c.,* 2015 QCCA 205, para. 26 [TAB 10]**

- ***Lorrain c. Petro-Canada*, 2013 QCCA 332, para. 94 [TAB 12]**

- ***Union des consommateurs c. Bell Canada*, 2010 QCCA 351, paras. 34-37 [TAB 13]**

- ***Contat v. General Motors du Canada ltée,* 2009 QCCA 1699, para. 33 (Motion for leave to appeal to the Supreme Court of Canada dismissed (C.S. Can., 2010-01-28)) [TAB 16]**

82. It is important to recall the unique situation alleged by the Plaintiff:

a) He purchased a second-hand 2005 Nissan Frontier on the website Kijiji in the spring of 2014;

b) He paid a total a sum of $1,000 for his vehicle;

c) His vehicle was previously severely damaged ("véhicule gravement accidenté") and "reconstructed" prior to his purchase;

d) The eventual alleged failure of the Timing Chain System of his vehicle was something that "he observed" further to a "loud banging noise coming from the engine of his vehicle" in the spring of 2015 and which occurred some 10 years after the car was manufactured; and

e) At the time of the alleged failure, the Plaintiff's vehicle had an approximate mileage of 120,000 kilometers.

- **Authorization Application, para. 31.**

- **Exhibit N-1; Exhibit N-7, pp. 13; Exhibit N-8, pp. 6-10, 37.**

83. By his own admission, the Plaintiff was not at all concerned with the fact that his vehicle was severely damaged and reconstructed prior to purchase and made no effort to ask further questions to the seller or anyone else regarding whether this might have had an impact on the safety or the Timing Chain System of his vehicle.

- **Exhibit N-8, pp. 7-8.**

84. Moreover, it appears that following the alleged failure of his Timing Chain System in 2015, the Plaintiff was no more concerned or interested in determining if other individuals might have experienced a similar issue with any of the Subject Vehicles.

85. Given the extremely unique circumstances surrounding the condition of his vehicle and the lack of effort or any care to investigate possible issues with his vehicle's condition before or after the alleged failure of his Timing Chain System, it is no surprise that there are no allegations or evidence in the Authorization Application regarding any efforts taken by the Plaintiff to demonstrate the existence of an actual class or even to identify one other individual who might have experienced the same situation as he did.

86. In the *Petitioner's Plan of Argument for the Application for Authorization to Institute a Class Action and to Obtain the Status of Representative Plaintiff* (the "**Plaintiff's Plan of Argument**"), the Plaintiff admits that the number of class members is unknown, but justifies the absence of <u>any</u> steps taken to find other members of the group by the following statement:

- **Plaintiff's Plan of Argument, para. 62.**

> "While the exact number of class members is unknown to the Applicant at the present time, in light of the fact that the Nissan generate revenues in the billions of dollars;"

87. With respect, an analysis of the Authorization Application demonstrates that not only does the Plaintiff not know the exact number of class members, he does not know if there is anyone except himself in his situation or if there are any actual members in the Proposed Class advanced.

88. The fact that Nissan generates "billions of dollars", an allegation which is unsupported and appears for the first time in the Plan of Argument, is entirely irrelevant to the requirement to demonstrate the existence of the group and that the Plaintiff is not alone in his situation.

89. Moreover, the general allegations of a defect affecting all of the 23 Subject Vehicles without any evidence to support those allegations, are not sufficient to establish the existence of a class for the purposes of article 575 (3) CCP.

- ***Hébert c. KIA Canada inc.,* 2014 QCCS 3968, confirmed on appeal 2015 QCCA 1911, paras. 20 and 33 [TAB 11]**

> "[20] Pour qu'un recours collectif soit autorisé, encore faut-il qu'un groupe de personnes soit aux prises avec les mêmes problèmes. Sur cette question, M. Hébert allègue qu'il n'est pas le seul à subir des inconvénients en raison de la technologie Bluetooth. Il formule plusieurs allégations qui méritent d'être analysées séparément.
>
> […]
>
> ***• 2.18 De plus, la constatation du requérant était claire. Sa voiture n'était pas la seule défectueuse;***
>
> [33] Il s'agit d'une allégation générale qui n'établit pas l'existence d'un groupe." (Our underlining)

90. To the contrary, because the Plaintiff made no effort to identify even one other class member and alleges no facts to demonstrate that he is not alone in his situation, there is a presumption that the Plaintiff's alleged problems are indeed unique to him.

- ***Hébert c. KIA Canada inc.,* 2014 QCCS 3968, confirmed on appeal 2015 QCCA 1911, para. 42 [TAB 11]**

> "[42] Au contraire, comme on l'a vu précédemment, il existe une présomption de faits qui tend à démontrer que les problèmes de M. Hébert sont propres à lui compte tenu qu'il n'a pas été en mesure d'identifier un seul autre propriétaire ou locataire au Québec d'une voiture KIA aux prises avec un des problèmes qu'il a

> identifiés alors qu'il allègue que plus de 77 000 véhicules sont équipés avec le même système."

91. This is not a case where it is obvious that a significant number of others are in the same situation and where the Court is thus able to infer the existence of a class as outlined in *Lévesque c. Vidéotron* cited above. In the present case, given the unique circumstances proper to the Plaintiff, it is far from evident that a significant number of consumers will find themselves in an identical situation.

92. The Plaintiff in the present case has advanced a unique case without alleging any facts which might suggest that he is not alone in his particular situation. He has thus failed to even demonstrate the existence of a class as required by article 575 (3) CCP and the Authorization Application must be refused for this reason alone.

B. PLAINTIFF IS NOT IN A POSITION TO PROPERLY REPRESENT THE MEMBERS OF THE PROPOSED CLASS (575 (4) CCP)

93. Article 575 (4) CCP requires that the member to whom the Court intends to ascribe the status of representative be able to ensure the adequate representation of all of the members of the proposed class. This requires notably that the Plaintiff has a sufficient interest to bring an action.

- ***Lebrasseur v. Hoffmann-La Roche ltée,* 2013 QCCS 3024, para. 51. [TAB 15]**

94. It is the Plaintiff who has the burden of proving that he personally has a cause of action against the Nissan Defendants.

- ***Contat v. General Motors du Canada ltée,* 2009 QCCA 1699, para. 33 (Motion for leave to appeal to the Supreme Court of Canada dismissed (C.S. Can., 2010-01-28) [TAB 16]**

> "[33] Even though it is not necessary to have the "best possible representative", appellant, having a non-existent or extremely weak personal claim, could not adequately represent the whole group. On one hand, it is his claim which would normally be the basis for the Court to analyze and decide the case. On the other hand, the procedural vehicle of the class action was not designed to be a method of circumventing principles of civil law. Thus, it must be shown in a class action, just as in any other action for damages, that there has been a fault, a damage and that there is a causal relationship between the two." (Our underlining)

95. As already demonstrated, neither the general and unsupported allegations of the Authorization Application nor the allegations of the Plaintiff's unique situation establish an appearance of right or arguable case against the Nissan Defendants as required by the second paragraph of article 575 CCP. Plaintiff has no valid

cause of action that the Nissan Defendant's committed a fault causing damages to all of the members of the Proposed Class and this is fatal to his ability to properly represent the Proposed Class.

- ***Contat v. General Motors du Canada ltée,* 2009 QCCA 1699, para. 36 (Motion for leave to appeal to the Supreme Court of Canada dismissed (C.S. Can., 2010-01-28) [TAB 16]**

  "[36] […] Just as appellant fails to satisfy the essential condition of showing that the facts alleged seem to justify the conclusions sought with respect to his claim (art. 1003 b) C.C.P.), he also fails to satisfy the essential condition of showing that he is in a position to adequately represent the members of the group (art. 1003 d) C.C.P.)."

- ***Lebrasseur v. Hoffmann-La Roche ltée,* 2013 QCCS 3024, para. 53. [TAB 15]**

  "[53] En traitant du paragraphe 1003 b) C.p.c., le Tribunal a déjà conclu que M. Lebrasseur n'avait pas démontré l'existence d'une apparence sérieuse de droit; il ne peut donc avoir l'intérêt requis pour intenter le recours collectif (…)"

- ***Lorrain c. Petro-Canada*, 2013 QCCA 332, paras. 94-95 [TAB 12]**

- ***Union des consommateurs c. Bell Canada*, 2010 QCCA 351, paras. 34-37 [TAB 13]**

96. Moreover, even if the Plaintiff would have demonstrated a valid cause of action, which is not the case, the Plaintiff is not a person by whom the members would agree to be represented if we apply the rules for mandates, considering his unique situation which demonstrates no arguable case of latent defect causing any damages and his failure to take any steps whatsoever to identify even one other class member or demonstrate the existence of a class.

- ***Perreault c. McNeil PDI inc*., 2012 QCCA 713, paras. 85-86 [TAB 17]**

  "[85] Non seulement cette absence de consultation met en cause sa capacité à agir comme représentante, mais elle soulève aussi de sérieuses interrogations sur la valeur de son affirmation selon laquelle les questions soulevées par sa demande d'autorisation sont similaires à celles de tous les membres du groupe. Comment en effet tenir pour avérée la situation d'un groupe de personnes dont on n'a même pas recherché l'avis de quelques-unes d'entre elles?

  [86] Je n'hésite pas à dire, dans ces circonstances, que les démarches de l'appelante, qui elle-même est avocate, sont beaucoup trop sommaires pour que lui soit reconnu le statut de

> représentante du groupe[37]. Si tant est qu'elle eût possédé un droit d'action valable à l'égard des intimées, ce qui n'a pas été démontré, elle n'a, de toute manière, pas établi qu'elle était cette personne « par qui les membres accepteraient d'être représentés si la demande était formée selon l'article 59 C.p.c. […].”

97. Based on the above, the Plaintiff cannot purport to personally have a valid cause of action against the Nissan Defendants, which is not only fatal under article 575 (2) CCP, but also means that he is not in a position to properly represent the members of the Proposed Class (assuming it exists which has not been demonstrated by the Plaintiff) as per article 575 (4) CCP.

98. In our respectful view therefore, the answer to the question raised in the introduction to these arguments as to whether the Superior Court of Québec can authorize a class action on the sole basis of general statements and the personal opinions and hypotheses of one person without any tangible evidence to form an arguable case is clearly no.

99. For all of these reasons, the Authorization Application must be dismissed.

THE WHOLE RESPECTFULLY SUBMITTED.

Montreal, this February 11, 2019

(s) Fasken Martineau DuMoulin LLP

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C A N A D A

PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL

(Class Action)
SUPERIOR COURT

No: 500-06-000839-171

FRANCIS LEVESQUE

Applicant

v.

NISSAN CANADA INC.

-and-

NISSAN NORTH AMERICA, INC.

-and-

NISSAN MOTOR CO., LTD.

Defendants

NOTES AND AUTHORITIES

DESCRIPTION	TAB
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Montreal, this February 11, 2019

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