

C A N A D A

PROVINCE OF QUÉBEC  
DISTRICT OF MONTRÉAL

(Class Action)  
SUPERIOR COURT

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No: 500-06-000839-171

**FRANCIS LEVESQUE**

Applicant

v.

**NISSAN CANADA INC.**

-and-

**NISSAN NORTH AMERICA, INC.**

-and-

**NISSAN MOTOR CO., LTD.**

Defendants

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**EX POST FACTO AND SECOND APPLICATION  
FOR PERMISSION TO EXAMINE THE APPLICANT FRANCIS LEVESQUE  
AND TO SUBMIT RELEVANT EVIDENCE  
(Article 574 CCP)**

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TO THE HONOURABLE DONALD BISSON, J.S.C., THE DEFENDANTS  
RESPECTFULLY SUBMIT THE FOLLOWING:

1. The Defendants Nissan Canada Inc. and Nissan North America, Inc. (collectively hereinafter referred to as "**Nissan**") hereby seek the permission of this Honourable Court to examine the Applicant Francis Lévesque and to submit the transcript and answers to undertakings subscribed to during the examination, if any, as relevant evidence pursuant to article 574, para. 3 of the Code of Civil Procedure, CQLR, c. C-25.01 ("**CCP**").
  - I. **Background**
2. On June 29, 2017, Nissan notified and filed with this Honourable Court its original *Application for permission to examine the Applicant and to Submit Relevant Evidence* (the "**Application**"), as appears from the Court Record.

3. On September 26, 2017, Justice Guylène Beaugé, J.S.C wrote to the parties indicating that she was the judge assigned to this matter, acknowledging receipt of the Application and requesting the parties to determine and agree on the length of the hearing of the Application, as appears from Justice Beaugé's letter dated September 26, 2017 attached hereto as **Exhibit N-1**.
4. On October 2, 2017, counsel for Nissan wrote to Justice Beaugé informing her that Applicant Francis Lévesque was not contesting the Application and suggesting that the hearing of the Application take place by telephone, as appears from a copy of the letter dated October 2, 2017 attached hereto as **Exhibit N-2**.
5. On October 4, 2017, Justice Beaugé wrote to the parties to inform them that given that there was no opposition to the Application, a hearing by phone or otherwise was no longer necessary. She further noted that once the examination took place and the relevant evidence filed, a telephone case management conference would be set to determine the next steps, as appears from a copy of Justice Beaugé's email dated October 4, 2017 attached hereto as **Exhibit N-3**.
6. On April 26, 2018, as agreed, counsel for Nissan proceeded with the examination out-of-court of Applicant Francis Lévesque.
7. On May 15, 2018, counsel for Nissan was provided with a copy of the transcript of Applicant Francis Lévesque's out-of-court-examination.
8. During this examination, a total of eight (8) undertakings were subscribed to by Applicant Francis Lévesque requiring the communication of certain information and documents.
9. To date, none of the undertakings subscribed to by the Applicant Francis Lévesque have been provided to Nissan.
10. On July 10, 2018, Justice Beaugé wrote to the parties indicating that the Honourable Justice Donald Bisson, J.S.C, was now assigned as the judge of the present matter, as appears from the Court Record.
11. On July 11, 2018, your Honour wrote to the parties to inquire as to whether the examination of Applicant Francis Lévesque had taken place and asking the parties if any preliminary applications were contemplated, as appears from a copy of your Honour's email dated July 11, 2018 attached hereto as **Exhibit N-4**.
12. On the same day, counsel for Nissan wrote to your Honour to confirm that the examination of Applicant Francis Lévesque had taken place on April 26, 2017, and that the undertakings subscribed to during this examination remained unanswered, as appears from a copy of the email dated July 11, 2018 attached hereto as **Exhibit N-5**.

13. On July 13, 2018, your Honour indicated to counsel that, despite an agreement between the parties and confirmation by email from Justice Beaugé that no hearing on the Application was necessary, a formal judgement of this Honourable Court was nonetheless required with respect to all preliminary applications, including any request to examine the Applicant Francis Lévesque and to adduce relevant evidence, if any.
14. In the same correspondence, your Honour indicated that all preliminary applications were to be filed with the Court by August 24, 2018 and that the hearing on these motions would take place on September 4, 2017 at 9:30 a.m., as appears from a copy of your Honour's email dated July 13, 2018 attached hereto as **Exhibit N-6**.
15. It is in this context that Nissan hereby seeks the permission of this Honourable Court to examine the Applicant Francis Lévesque *ex post facto* and to submit the transcript and answers to undertakings subscribed to during the examination as relevant evidence pursuant to article 574, para. 3 of the CCP.

**II. The Application for Authorization to Institute a Class Action and to Appoint a Representative Plaintiff**

16. On or about January 17, 2017, Applicant Francis Lévesque filed an Application for Authorization to Institute a Class Action and to Appoint a Representative Plaintiff (the "**Authorization Application**") on behalf of the following 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."
17. In the Authorization Application, the Applicant claims, *inter alia*, that Nissan continued to install a timing chain tensioning system, a component of the power train, in the Subject Vehicles knowing that it was prone to dangerous and unavoidable premature failure (the "**Timing Chain Tensioning System**").
18. The Applicant alleges that he and the class members purchased or leased their vehicles based on the representations allegedly made by Nissan over the course of several years that the Timing Chain Tensioning System would last for the useful life of the vehicle without the need for repair and replacement, and that they would not have purchased or leased the vehicles had they known about the defective Timing Chain Tensioning System.
19. As a result of the alleged defective Timing Chaim Tensioning System and false or misleading representations regarding its maintenance, the Applicant claims that he over-paid for his vehicle, a 2005 Nissan Frontier that he bought in 2014 for the sum of \$1,200, that the vehicle now has a reduced resale value, without saying how, and that he has incurred costs to replace and repair the Timing Chain Tensioning System and engine of his vehicle, without saying how much, and that he has suffered other troubles and inconveniences.

III. The Relevance and Scope of the Examination of the Applicant

20. The examination of the Applicant before the hearing of the Application is relevant to provide this Honorable Court with facts relating to:
  - a) The circumstances surrounding the purchase, maintenance and use of the vehicle by the Applicant or previous owner or owners;
  - b) The allegations that Nissan falsely represented over several years that the Timing Chain Tensioning System would last for the useful life of the vehicle without the need for repair and replacement;
  - c) The circumstances surrounding the replacement of the Timing Chain Tensioning System and the costs allegedly incurred directly or indirectly as a result;
  - d) The Applicant's allegations that he and other class members have suffered ascertainable loss as a result of the alleged defects affecting the Timing Chain Tensioning System, including trouble and inconvenience and injury;
  - e) The facts regarding the Applicant's ability to properly represent the members of the proposed class, including, but not limited to, the nature of the steps taken by him leading up to and culminating in the filing of the Application, as well as his efforts, if any, to identify other members of the proposed class.
21. The Applicant's examination regarding these subjects will help this Honourable Court in its analysis of the criteria for authorization of the Class Action pursuant to article 575 CCP, more particularly with regard to the existence of identical, similar or related questions of law or fact requirement (article 575 (1) CCP) to the appearance of right requirement (article 575 (2) CCP) and the Applicant's ability to adequately represent the members of the proposed Class (article 575 (4) CCP).
22. It is in the interest of justice and the parties that Nissan be given *ex post facto* the permission to examine the Applicant and to file the transcript of the examination as well as the answers to the undertakings subscribed to during the examination that took place on April 26, 2018.
23. In this regard, and in order to assist this Honourable Court with its appreciation of the present Application, the transcript of the out-of-court examination that Nissan seeks permission to adduce as relevant evidence is attached hereto as **Exhibit N-7**.

24. As explained, however, since none of the undertakings subscribed to by Applicant Francis Lévesque have yet been received by Nissan they are not filed in support of the present Application. This said, Nissan nonetheless seeks this Honourable Court's permission to adduce any undertakings received to its requests as relevant evidence, the case permitting.
25. The present Application is well founded in fact and in law.

**FOR THESE REASONS, MAY IT PLEASE THIS COURT TO:**

**GRANT** the present Application;

**GIVE PERMISSION TO** the Defendants Nissan Canada Inc. and Nissan North America, Inc. to examine the Applicant Francis Lévesque out of court and before the hearing of the Application for Authorization to Institute a Class Action regarding the following subjects:

- a) The circumstances surrounding the purchase, maintenance and use of the vehicle by the Applicant and the precedent owner(s) of the vehicle;
- b) The allegations that Nissan falsely represented that the Timing Chain Tensioning System would last for the useful life of the vehicle without the need for repair and replacement;
- c) The circumstances surrounding the replacement of the Timing Chain Tensioning System and the direct and indirect costs allegedly incurred as a result;
- d) The Applicant's allegations that he and other class members have suffered ascertainable loss as a result of the alleged defects affecting the Timing Chain Tensioning System, including trouble and inconvenience and injury;
- e) The facts regarding the Applicant's ability to properly represent the members of the proposed class, including, but not limited to, the nature of the steps taken by him leading up to and culminating in the filing of the Application, as well as his efforts, if any, to identify other members of the proposed class.

**DECLARE** that the examination out-of-court of the Applicant Francis Lévesque that took place on April 26, 2018 to be valid in all respects.

**AUTHORIZE** the Defendants Nissan Canada Inc. and Nissan North America, Inc. to file the transcript of the examination of Applicant Francis Lévesque and the answers to the undertakings subscribed to during the examination, if any.

**ORDER** the Applicant to communicate the undertakings within 30 days of the judgment of this application.

**THE WHOLE** without legal costs, unless the present Application is contested.

Montréal, this August 24, 2018



Me André Durocher

Me Noah Boudreau

**Fasken Martineau DuMoulin LLP**

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**NOTICE OF PRESENTATION**

**ADDRESSEE(S):**

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**TAKE NOTICE** that the present *Ex Post Facto* and Second Application for Permission to Examine the Applicant Francis Levesque and to Submit Relevant Evidence will be presented for adjudication before the honourable justice Donald Bisson S.C.J. of the Superior Court, sitting in civil practice division for the district of Montréal on September 4<sup>th</sup>, 2018 at 9:30 or so soon thereafter as counsel may be heard, in a room to be determined at the Montréal courthouse, located at 1 Notre-Dame Street East, Montréal, Quebec, H2Y 1B6.

**DO GOVERN YOURSELVES ACCORDINGLY.**

Montréal, this August 24, 2018



Me André Durocher

Me Noah Boudreau

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**C A N A D A**

**PROVINCE OF QUÉBEC  
DISTRICT OF MONTRÉAL**

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Defendants

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**LIST OF EXHIBITS**

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- N-1** Copy of Justice Beaugé's letter to parties dated September 26, 2017
- N-2** Copy of the letter from Nissan's counsel to Justice Beaugé dated October 2, 2017
- N-3** Copy of Justice Beaugé's email to parties dated October 4, 2017
- N-4** Copy of Justice Bisson's email to parties dated July 11, 2018
- N-5** Copy of the email from Nissan's counsel to Justice Bisson dated July 11, 2018
- N-6** Copy of Justice Bisson's email to parties dated July 13, 2018
- N-7** Transcript of the out-of-court examination that Nissan seeks permission to adduce as relevant evidence



Montréal, this August 24, 2018



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LOCALITY OF MONTREAL

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PERMISSION TO EXAMINE THE APPLICANT  
FRANCIS LEVESQUE AND TO SUBMIT RELEVANT  
EVIDENCE (Article 574 CCP), NOTICE OF  
PRESENTATION, LIST OF EXHIBITS  
AND EXHIBITS N-1 TO N-7  
(Class Action)**

ORIGINAL

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