

SUPERIOR COURT

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No.: 500-06-001053-202

DATE: October 27, 2021

BY THE HONOURABLE MARTIN F. SHEEHAN, J.S.C.

ASSOCIATION POUR LA PROTECTION AUTOMOBILE (APA)
and
LILIANE ROCHA
Plaintiffs

v.
NISSAN CANADA INC.
Defendant

JUDGMENT
(On request for documents (articles 169 and 251 C.C.P.))

OVERVIEW

[1] Plaintiffs, Association pour la protection automobile (“**APA**”) and Ms. Liliane Rocha, seek from Defendant, Nissan Canada Inc. (“**Nissan**”), the production of various documents. They allege that these documents are relevant to their case and are required to allow their experts to prepare a report, which the Court ordered them to file prior to Nissan filing its defense and submitting to a deposition of its representative.

[2] Defendant opposes the request. It pleads that the request is overly broad and represents an unreasonable burden. It adds that some requests would require them to create documents, which do not exist in the form sought by Plaintiffs.

CONTEXT

[3] On May 4, 2021, the Court authorize the issuance of a class action on behalf of customers who purchased or leased a Nissan vehicle (the “**Equipped Vehicles**”) equipped with a continuous variable transmission (“**CVT**”). The claim seeks compensatory and punitive damages and asks that Nissan be compelled to extend its warranty on the CVT.

[4] The common questions identified to be treated collectively include the following:

- 4.1. Do transmission problems in the Equipped Vehicles amount to a latent defect?
- 4.2. Are class members affected by this latent defect in their vehicle entitled to reimbursement of costs incurred to repair the transmission?
- 4.3. Are class members entitled to compensatory and/or punitive damages?

[5] As part of their application for authorization of a class action, Plaintiffs included a request for various documents. The judgment authorizing the class action (the “**Authorization Judgment**”) deferred adjudication of this issue.¹

[6] During a case management conference held in early October, the Court ordered Plaintiffs to file their expert reports prior to Defendant filing its defense. One of the considerations for this decision was that Plaintiffs would present a new document request that would allow their expert to benefit from the information required to complete the report.

[7] The Court set the following timetable with regard to the document request:²

- 7.1. Plaintiffs were asked to transmit, no later than October 8, 2021, the list of requested documents;
- 7.2. Defendant was to notify Plaintiffs of its position with respect to the request and file its notes and authorities in support of its challenge, if any, on October 15, 2021;
- 7.3. Plaintiffs were allowed to file a reply on October 19, 2021.

[8] The Court heard the parties’ oral arguments on October 20, 2021.

¹ *Association pour la protection automobile (APA) c. Nissan Canada inc.*, 2021 QCCS 1762, para. 106.

² *Association pour la protection automobile (APA) c. Nissan Canada inc.*, 2021 QCCS 4153, paras. 31 to 34.

ANALYSIS

Applicable Law

[9] Articles 169, 221 and 251 of the *Civil Code of Procedure* (“**C.C.P.**”) allow a person to apply to the court for an order directing another party to the proceedings or a third party to disclose a document.

[10] Such applications can be brought in the context of class actions especially after they have been authorized.³

[11] The principles which should guide the court when it is called upon to adjudicate on document requests made during the pre-trial phase can be summarized as follows:

- 11.1. Examinations for discovery and document requests are essential elements of the exploratory phase in civil matters. Their goal is to facilitate the disclosure of evidence that enables the parties to evaluate the strength of their respective cases and encourage out of court settlements.⁴
- 11.2. Unlike section 168(8) of the former C.C.P., such requests are no longer restricted to documents that the other party intends to file during the hearing. Furthermore, a party may present a document request before or even in the absence of a pre-trial deposition of the opposing party.⁵
- 11.3. The court should encourage the fullest and earliest possible disclosure of evidence. Such disclosure is in line with the duty of transparency and cooperation required for the sound management of proceedings and a fair judicial debate, as opposed to a trial by ambush (articles 19 and 20 C.C.P.).⁶
- 11.4. While the right to pre-trial disclosure must be interpreted broadly, it is not unlimited. Parties must respect the principle of proportionality (articles 18 and 19 C.C.P.) and their conduct must facilitate the progress of the proceedings rather than having them delayed, complicated or even jeopardized by the introduction of evidence that does not assist in

³ *Ravary c. Fonds mutuels CI inc.*, 2018 QCCA 606 (Motion for leave to appeal to the Supreme Court dismissed (Can C.S., 2019-04-11) 38171); *A. c. Frères du Sacré-Coeur*, 2019 QCCS 258, paras. 31 to 34; *Lalande c. Compagnie d'arrimage de Québec Itée*, 2017 QCCS 6142, paras. 20 and 25; *Fortin c. Mazda Canada inc.*, 2017 QCCS 5661, para. 55.

⁴ *Pétrolière Impériale c. Jacques*, 2014 CSC 66, para. 26.

⁵ *CMC Électronique inc. c. Procureure générale du Québec*, 2020 QCCS 124, para. 31; *Construction Canmec Euler inc. c. Groupe TNT inc.*, 2018 QCCS 637, para. 33; *Moreno c. Lalanne Zéphyr*, 2017 QCCS 4149, paras 18 to 22.

⁶ Denis FERLAND et Benoît EMERY, *Précis de procédure civile du Québec*, 6^e éd., Montréal, Éditions Yvon Blais, 2020, volume 1, para. 1-1336; *Grid Solutions Canada c. Murphy*, 2019 QCCA 1141, para. 6; *Sotramont Gatineau Inc. c. Original Baked Quality Pita Dips Inc.*, 2020 QCCS 143; *Envac Systèmes Canada inc c. Montréal (Ville de)*, 2016 QCCS 1931, para. 27.

establishing the rights being advanced. Fishing expeditions, repeated demands and indiscriminate searches are not allowed. The court has a discretion to reduce the financial and administrative burden on the party from whom documents are requested by imposing reasonable constraints. The court may also refuse disclosure of information when complying with the request would require the analysis of a disproportionate number of documents, an excessive number of hours or impose disproportionate costs.⁷

11.5. A party may object to disclosure on the grounds of privilege or because a “substantial and legitimate interest” would be compromised by complying.⁸ This notion must be interpreted restrictively. If the court finds that a “substantial and legitimate” interest exists, but that the implied undertaking of confidentiality or some other means of protection or control may resolve the disclosure issue, it must dismiss the objection.⁹

11.6. It is generally accepted that courts should not order witnesses to perform analytical work or force them to prepare a document that does not exist as is, especially when the analysis or preparation would require significant effort and the information requested is not available in the desired format.¹⁰ However, disclosure can be ordered when the information can be prepared with relative ease and by following simple procedures.¹¹

⁷ *Imperial Oil v. Jacques*, 2014 SCC 66, paras. 31 and 85; *Grid Solutions Canada c. Murphy*, *supra*, note 6, para. 7; *Duguay c. Compagnie General Motors du Canada*, 2019 QCCA 1058, para. 8; *Digital Shape Technologies inc. c. Comte*, 2018 QCCA 955, para. 7; *Kloda c. CIBC World Markets Inc. (CIBC Wood Gundy)*, 2019 QCCS 761, paras 16 to 19; *Nolicam Location de camions inc. c. Budget Rent A Car Licensor*, 2019 QCCS 747, paras. 6 and 16; *A. c. Frères du Sacré-Coeur*, *supra*, note 3, para. 28; *Axxess International courtiers en douanes inc. c. Boulay*, 2018 QCCS 5363, para. 50; *Sintra inc. (région Estrie) c. Ville de Lac-Mégantic*, 2017 QCCS 4477, para. 30; *Charland c. Hydro-Québec*, 2017 QCCS 2623, paras. 39 and 46 (Permission to appeal denied, 2017 QCCA 1707).

⁸ Arts. 12 and 228 C.C.P.

⁹ *Sierra Club du Canada c. Canada (Minister of Finances)*, 2002 CSC 41, paras. 49, 50, 51 and 55; *Ministère des Travaux publics et Services gouvernementaux Canada c. David S. Laflamme Construction inc.*, 2017 QCCA 96, para. 6; *CMC Électronique inc. c. Procureure générale du Québec*, *supra*, note 5, para. 27; *Nolicam Location de camions inc. c. Budget Rent A Car Licensor*, *supra*, note 7, para. 6; *Siciliano c. Éditions La Presse Itée*, 2016 QCCS 3702, paras. 24 and 29 (Out of court settlement (C.A., 2016-06-23) 500-09-026076-166); *Luxme International Ltd. c. Lasnier*, 2016 QCCS 6389, paras.10 and 11.

¹⁰ Jean-Claude ROYER and Catherine PICHÉ, *La preuve civile*, 6th ed., Montreal, Yvon Blais, 2020, no 653; *Commission scolaire des Affluents c. Commission des droits de la personne et des droits de la jeunesse*, 2006 QCCA 81, para. 36; *Mutuelle du Canada (La), Cie d'assurance sur la vie c. Cie d'assurance-vie, Manufacturers*, 1987 CanLII 394 (QC CA), para 5; *Entrepreneurs de construction Concordia inc. c. Régie des installations olympiques*, 2021 QCCS 3236, para. 34.

¹¹ *Charkaoui c. Canada (Procureur général)*, 2013 QCCS 7132, para. 39.

- 11.7. The document must be in the custody or under the control of the person from whom it is sought. This person must either be in possession of the document or be able to obtain it by reasonable means.¹²
- 11.8. When the document is in possession of a third party, this party should be given notice of the request prior to a motion being presented to the court. Such a procedure grants the third party time to consider the request and potentially consent to it and avoids the possibility of a motion to retract the judgment ordering disclosure.¹³
- 11.9. A party who wishes to obtain communication of documents has the burden of showing that they are relevant and that the targeted information will advance the litigation.¹⁴ However, since the judge who assesses relevance at a preliminary stage does not have the benefit of having heard all the evidence, the notion of relevance must be interpreted broadly and any doubt as to the relevance of a response must favour disclosure.¹⁵
- 11.10. A party who wishes to oppose disclosure on the basis of privilege or a substantial interest has the burden of proving same.

Discussion

[12] On October 8, 2021, Plaintiffs communicated an amended list of documents totalling 28 types of documents. The list, attached to the present judgment as Annex A, is divided into five categories defined by Plaintiffs as follows:

- 12.1. Documents to facilitate the identification of group members;
- 12.2. Documents required to calculate the amount paid by class members, for the purpose of obtaining a collective recovery order;
- 12.3. Documents needed to assess the level of Nissan's knowledge of the existing problems on its CVT Equipped Vehicles and of group members' complaints regarding same;
- 12.4. Documents relevant to punitive damages;
- 12.5. Documents requested to allow Plaintiffs' experts to prepare their expert report.

¹² J.-C. ROYER and C. PICHÉ, *supra*, note 10, no 653.

¹³ *Entrepreneurs de construction Concordia inc. c. Régie des installations olympiques*, *supra*, note 10, paras. 29 to 30.

¹⁴ *Kloda c. CIBC World Markets Inc. (CIBC Wood Gundy)*, *supra*, note 7, para. 16; *Lambert (Gestion Peggy) c. Écolait Itée*, 2017 QCCS 5429, paras 28 to 31.

¹⁵ *Siciliano c. Éditions La Presse Itée*, *supra*, note 15, para. 48.

[13] If Nissan is not in possession of the documents, Plaintiffs ask that Nissan disclose who controls them.

[14] As the parties limited their representations to the documents as a group, they will mostly be dealt with in a similar fashion in this judgment except where particulars are required.

A. DOCUMENTS TO FACILITATE THE IDENTIFICATION OF GROUP MEMBERS

1- List of names and contact information of all group members

[15] Plaintiffs ask that Defendant produce the list of class members.

[16] Defendant objects on two grounds: confidentiality and relevance.

[17] With regard to the first argument, they rely on the Court of Appeal case of *Filion c. Québec (Procureure générale)*.¹⁶ In that case, a defendant wished to obtain the list of members who had manifested themselves to class counsel (identified as registered members). The defendant wished to contact members who had not manifested themselves to class counsel (non-registered members) in the hope that it could convince some of them to testify for the defence. The Court of Appeal held that the law makes no distinction between registered and non-registered members. The Court observed that members are entitled to anonymity and that the disclosure potentially raised issues of solicitor-client privilege. Finally, the Court stated that it would be inappropriate for the defendant to meet with class members in the absence of class counsel. In passing, it noted that group members are plaintiffs in the class action and that their status is “very close” to that of a party to the proceedings.¹⁷

[18] The *dictum* of the Court of Appeal with regard to anonymity was very much qualified in the subsequent decision of *Belley c. TD Auto Finance Services Inc./Services de financement auto TD Inc.*¹⁸ In that case, the Court of Appeal questioned whether there exists a principle of anonymity protecting members in a class action.

[19] In any event, far from assisting Nissan, the *Filion* case rather supports the arguments of the Plaintiffs. Once a class action is authorized, class counsel represents the interests of all class members who have not excluded themselves. Class action notices must include contact information for the representative and class counsel.¹⁹ This is to ensure that proper communication can take place between the members, the representative and class counsel. The disclosure sought here is in line with the objective of facilitating discussions between class counsel and the class members.

¹⁶ *Filion c. Québec (Procureure générale)*, 2015 QCCA 352.

¹⁷ *Ibid*, para. 48.

¹⁸ *Belley c. TD Auto Finance Services Inc./Services de financement auto TD inc.*, 2018 QCCA 1727.

¹⁹ Art. 579(3) C.C.P.

[20] Thus, the confidentiality argument is dismissed.

[21] With regard to relevance, Defendant relies on *Dupuis c. Desjardins Sécurité financière, compagnie d'assurance-vie*.²⁰ In that case, the Court refused to order the disclosure of a list of class members on the basis that the list did not exist and that it would be of no use in answering the collective questions identified in the authorization judgment.

[22] The situation is different here.

[23] First of all, the list of members exists. In fact, on October 7, 2021, the Court ordered defendant to send class action approval notices to all members for which it has an email address.

[24] Secondly, the number and identity of members are relevant to the issue of damages raised in the class action. Full disclosure on the issue of damages is in the interest of justice. At one extreme, the number of members could influence Plaintiffs' desire to go forward with the class action.²¹ In other cases, it can serve as a starting point for eventual settlement discussions.

[25] The Court notes that in several cases judges have, albeit without much discussion, ordered defendants to disclose the identity of class members to class counsel.²²

[26] Disclosure of the list is ordered.

B. DOCUMENTS REQUIRED TO CALCULATE THE AMOUNT PAID BY CLASS MEMBERS FOR THE PURPOSE OF OBTAINING A COLLECTIVE RECOVERY ORDER

B.1. FOR REPAIRS THAT WERE PERFORMED OUTSIDE OF THE MANUFACTURER'S WARRANTY AT A NISSAN DEALERSHIP:

- 1- The number of repairs performed outside of the warranty
- 2- The number of breakdowns and towed vehicles reported to Nissan for reasons related to the class action
- 3- Details of such repairs including the year, model and mileage of the vehicle
- 4- The amount of each to the member for each of these repairs

²⁰ *Dupuis c. Desjardins Sécurité financière, compagnie d'assurance-vie*, 2016 QCCS 6349.

²¹ *Azoulay c. Staples Canada*, 2021 QCCS 3783.

²² *Madic c. Banque Nationale du Canada*, 700-06-000009-185, C.S. 18-06-2019; para. 45; *Choquette c. Air Canada*, 2017 QCCS 234, para. 81 (Class action allowed (C.S., Previous occurrence 2017 Next occurrence-05-26) 500-06-000717-146); *Grand-Maison c. Mazda Canada inc.*, 2016 QCCS 2428, para. 90; *Duguay c. General Motors du Canada Itée*, 2016 QCCS 1624, para. 86; *Fortin c. Banque de Nouvelle-Écosse*, 2015 QCCS 1483, para. 49.

- 5- The number of such repairs for which Nissan has agreed to pay the full or partial cost
- 6- The cost that Nissan has agreed to pay for these repairs
- 7- The form, commonly called good will or other document that the dealer must send to Nissan related to these repairs
- 8- Any internal Nissan document used to analyze such good will or similar type of request

B.2 FOR REPAIRS PERFORMED UNDER THE MANUFACTURER'S WARRANTY:

- 1- The number of such repairs
- 2- The list of members who have obtained a repair under warranty
- 3- The details of such repairs including the year, model and mileage of the vehicle
- 4- The amount the member paid, if any. For example, and without limitation the cost of oil or transmission filter, cost of diagnosis, etc.

[27] Plaintiffs seek the production of various documents that would allow them to estimate the value of the damages suffered by the group in order to petition the court for a collective recovery.

[28] Defendant objects on the basis that: 1) the evidence is not relevant to the representative's individual claim; 2) the information sought is a disguised request for the list of members; 3) Nissan contests collective recovery; 4) the evidence with regard to the repairs under warranty is irrelevant; 5) the information is in possession of third parties.

[29] With regard to relevance, Defendant's position, to the effect that only the representative's claim should be considered, is unfounded. Relevance must be assessed with regard to all of the common questions as they apply to the group as a whole. It must be remembered that, when there are multiple defendants, it is not necessary for the class representative nor other class members to have a personal cause of action against each of the defendant.²³ Thus, in many cases, documents in the hands of one defendant will be irrelevant to the personal claim of the representative yet remain highly relevant to the claim of other group members. Accepting Defendant's argument would have the effect of shielding from discovery any defendant who does not have a contractual relationship with the representative. This is not, nor should it be, the state of the law.

[30] The arguments concerning the list of members have already been dealt with.

²³ *L'Oratoire Saint-Joseph du Mont-Royal c. J.J.*, 2019 CSC 35, para. 44; *Bank of Montreal v. Marcotte*, 2014 SCC 55, paras. 41 to 47.

[31] With regard to collective recovery, some have argued that collective recovery should be preferred to individual recovery when it is appropriate.²⁴ This point does not need to be decided here. It suffices to note that Plaintiffs intend to ask for collective recovery and that Defendant intends to oppose the request.

[32] The Supreme Court of Canada in *Marcotte v. Fédération des caisses Desjardins du Québec*²⁵ observes that, while the burden of proving that collective recovery is appropriate rests with plaintiff, defendant may be required to provide information that will enable the plaintiff to fulfil its burden:

[32] There is insufficient evidence in the record to determine the total amount owed by Desjardins to those class members whose claims are not prescribed. At the same time, there is no evidence that it is not possible to determine this amount with sufficient accuracy. As Gascon J. noted at trial, the burden of proving that collective recovery is possible lies on the shoulders of the representative plaintiff. However, Desjardins is obliged to provide the information that would allow the plaintiff to fulfil his burden. Individual recovery will only be warranted if Desjardins is unable with reasonable diligence to provide the information needed to determine the total amount of the non-prescribed claims with sufficient accuracy. As at trial, all other details of the procedure for effecting recovery are left to be determined at a later date by the Superior Court.

[33] Thus, the information is relevant and the fact that Nissan intends to contest collective recovery is not a bar to disclosure.

[34] The fourth argument put forward is that the repairs under warranty are irrelevant, as they cannot lead to a damage claim. The latter may be true. However, Plaintiffs allege that the number of overall repairs (whether they were covered or not) is important as it gives an indication on to the frequency and severity of CVT related issues. Furthermore, Plaintiffs allege that some members may have suffered damages if they incurred charges related to the CVT that which were not covered by the warranty. Thus, the information is relevant.

[35] The last argument - that Nissan has no control over the information - is potentially more persuasive. However, there is no indication as to exactly which information is in the hands of which third party. The document request is limited to repairs performed by a Nissan dealer. Certainly, Nissan has access to information related to repairs performed within its dealer network. This information should be provided.

²⁴ Art. 595 C.C.P.; Pierre-Claude LAFOND, *Le recours collectif comme voie d'accès à la justice pour les consommateurs*, Montréal, Les Éditions Thémis, 1996, p. 454, quoted by Justice Nantel in *Laflamme c. Bell Mobilité inc.*, 2014 QCCS 525, para. 115 (Main appeal and incident withdrawal, 2016 QCCA 1177); Catherine PICHÉ et André LESPÉRANCE, « L'action collective comme outil de prévention, d'évitement et de dissuasion », dans Barreau du Québec, Service de la formation continue, *Colloque national sur l'action collective — Développements récents au Québec, au Canada et aux États-Unis* (2016), volume 410, Cowansville, Éditions Yvon Blais, 2016, p. 77.

²⁵ *Marcotte c. Fédération des caisses Desjardins du Québec*, 2014 CSC 57.

[36] With regard to other potentially unavailable information, the present order will apply only to documents in the custody or under the control of Nissan as well as documents that Nissan is able to obtain through reasonable means. With regard to information that Nissan does not have control over but knows who does, the Court prays act of Nissan's undertaking to identify, if possible, the third party who has access to the requested information.

[37] In closing, both judges²⁶ and authors²⁷ have commented on the information imbalance that exists between plaintiffs and defendants in class actions. This is especially true when it comes to the ability to estimate the number of potential plaintiffs involved in a class action and the amount of damages each of them has suffered. This imbalance is undoubtedly something the Court must take into consideration when it rules on document requests in the class action context.

[38] This is not to say that an order forcing defendants to disclose the number of class members and the damages each has suffered is appropriate in all cases. However, for the reasons stated above, the Court is satisfied that, in the circumstances of the present matter and at the current stage of the proceedings, most of the information is relevant and will assist the parties to move the matter forward.

[39] With regard to proportionality, Defendant did not plead that disclosure would impose an undue burden on Nissan. Nonetheless, disclosure of "good will" or similar documents is deferred until Nissan's representative is deposed. Once it has been established that these documents exist and how they are used, the request can be reiterated as an undertaking.

C. DOCUMENTS NEEDED TO ASSESS THE LEVEL OF NISSAN'S KNOWLEDGE OF PROBLEMS WITH ITS CVT EQUIPPED VEHICLES AND OF GROUP MEMBERS' COMPLAINTS REGARDING SAME

- 1- Service tickets opened at the time the dealer calls Nissan Canada Inc. commonly known as *Tech Hotline Ticket Management* or other similar type document
- 2- Correspondence and exchanges whether by email, mail or through the intranet communication system, or any other system, between Nissan and its dealers
- 3- Details of discounts or rebates granted to class members by Nissan or its dealers, including the amount, model, year and mileage of the vehicle

²⁶ *Sibiga c. Fido Solutions inc.*, 2016 QCCA 1299, para. 148; *Lévesque c. Vidéotron, s.e.n.c.*, 2015 QCCA 205, para. 28; *Jean-Paul c. Uber Technologies Inc.*, 2017 QCCS 164.

²⁷ Bruce JOHNSTON and Yves LAUZON, *Traité pratique de l'action collective*, Montréal, Éditions Yvon Blais, 2021, para. 2.4.3.

D. DOCUMENTS RELEVANT TO PUNITIVE DAMAGES

D1. DOCUMENTS RELATED TO THE EVALUATION OF DEFENDANT'S ASSETS FOR THE PURPOSE OF JUSTIFYING THE AMOUNT OF PUNITIVE DAMAGES WHICH SHOULD AWARD

- 1- Financial statements of Nissan Canada Inc. for the years covered by the class action, including the year 2020

D2. DOCUMENTS RELATED TO DEFENDANT'S BEHAVIOUR IN ORDER TO JUSTIFY A PUNITIVE DAMAGE AWARD

- 1- CVT related service tickets opened when a member calls Nissan's customer service department
- 2- Written complaints related to CVTs sent to Nissan including Field Investigation Reports and/or Customer Assistance Requests
- 3- All exchanges between Nissan and class members, by letter, email or any other means, regarding CVTs
- 4- Documents or information intended for the public, including:
 - a. Advertisements related to Equipped vehicles
 - b. Promotional materials related to Equipped Vehicles
 - c. Brochures for each of the Equipped Vehicles
 - d. Press releases issued to the media about CVTs

[40] These sections will be dealt with together but the analysis will be separated between the: 1) documents related to Nissan's knowledge and conduct; and 2) financial statements.

1) Documents related to Nissan's knowledge and conduct

[41] Applicants rely on article 272 of the *Consumer Protection Act*²⁸ ("CPA"), which provides the possibility of punitive damages if a merchant fails to fulfil an obligation imposed on it by the CPA.

[42] One of the common questions identified in the Authorization Judgment asks: "g) Are class members, who qualify as consumers, entitled to punitive damages of \$300 per Member from Defendant?"

²⁸ *Consumer Protection Act*, CQLR c. P-40.1.

[43] The Supreme Court of Canada²⁹ teaches that punitive damages have a preventive objective. Their purpose is “to discourage the repetition of undesirable conduct.” They may be awarded in the presence of “intentional, malicious or vexatious” violations of the CPA or conduct that displays “ignorance, carelessness or serious negligence with respect to their obligations and consumers’ rights under the CPA.” Such an evaluation requires consideration of “the whole of the merchant’s conduct at the time of and after the violation.”³⁰

[44] Applicants allege that the following facts demonstrate Nissan’s contempt and carelessness towards Quebec consumers:

- 44.1. Nissan has known about the manufacturing defect in the transmissions of its vehicles for several years;
- 44.2. Nissan has not acted or assisted its customers despite requests from Applicants and potential class members;
- 44.3. Nissan is aware that its obligations regarding the legal warranty of quality and durability of its vehicles exceed the conventional warranty that it provides to class members;
- 44.4. Nissan extended its warranty in the United States as a result of lawsuits against its US subsidiary, but, other than for certain Pathfinder models, it has refused to do so for Canadian and Quebec consumers;
- 44.5. The warranty on its Pathfinder vehicles was extended from 60 months / 100,000 km to 84 months / 135,000 km, which is clearly insufficient given that a transmission can and should function properly for much longer.³¹

[45] Without deciding whether the requested documents will support these allegations, there is no doubt that these documents, related to Nissan’s knowledge of a potential CVT issue as well as any response it adopted when it learned of the issue, are relevant to the common question concerning punitive damages and the allegations in support of such an award.

[46] An order to disclose the bulk of the documents is issued with some adjustments with regard to proportionality to curtail those requests that are overly broad. Public documentation will be limited to brochures and press releases. Further requests can be made during depositions if the witness’ answers lead to a conclusion that such requests are warranted.

²⁹ *Richard v. Time Inc.*, 2012 SCC 8.

³⁰ *Ibid.*, para. 180.

³¹ Re-modified Application dated February 22, 2021, para. 143.

2) Financial Statements

[47] Nissan objects to disclosing its financial statements on the basis that it is a private company and that its financial statements are confidential. They add that the request is premature and should be deferred to the merits of Plaintiffs' claim.

[48] Courts have ruled that financial statements are not *prima facie* privileged or confidential. Their disclosure is subject to the general rule, which compels disclosure of documents relevant to the issues raised in the litigation.³²

[49] The financial situation of a debtor is relevant to the quantification of punitive damages.³³ Plaintiffs are claiming such damages and one of the common issues relates to their assessment.

[50] Thus, the request is relevant.

[51] On that basis, courts have ordered disclosure of financial documents in the context of a punitive damage claim in the past.³⁴

[52] An order to defer this matter to the merits is not appropriate, as it would risk postponing the trial. Plaintiffs are entitled to have sufficient time to analyze the document.

[53] However, the request will be limited to the most recent financial statement.

[54] Any concern with regard to confidentiality is attenuated by the implied undertaking that surrounds pre-trial disclosures.³⁵ To further protect Nissan, an order is issued imposing on Plaintiffs a 30-day prior notice before they intend to file the financial statements in the court record in order to allow Nissan to make representations on measures which should be taken to protect any substantial interest in confidentiality.

³² *Pierre Giguère consultants inc. c. Pierre Landry électrique inc.*, 1997 CanLII 10793 (QC CA); *9227-1899 Québec inc. c. Gosselin*, 2013 QCCS 3527, para. 9; *Camiré c. Paradis (Architectes Deschamps, Paradis, s.e.n.c.)*, 2012 QCCS 6976, para. 13.

³³ *Richard v. Time Inc.*, *supra*, note 29, para. 201; *Fillion c. Chiasson*, 2007 QCCA 570, para. 107; *Conseil québécois sur le tabac et la santé c. JTI-Macdonald Corp.*, 2012 QCCS 3566, para. 8 (Leave to appeal dismissed, 2012 QCCA 1848 and 2012 QCCA 1847).

³⁴ *Lussier c. Expedia Group Inc.*, 2019 QCCS 4927, paras. 42 to 49; *Bolduc c. Arthur*, 2008 QCCS 6085; *Gauvin c. Arthur*, 2002 CanLII 9249 (QC CS), para. 19; *Grenier c. Arthur*, 2001 CanLII 25573 (QC CS), para. 50.

³⁵ *Lac d'amiante du Québec Ltée v. 2858-0702 Québec inc.*, 2001 SCC 51, para. 69; *Société financière Manuvie c. D'Alessandro*, 2014 QCCA 2332, para. 48 (Discontinuation of the motion for leave to appeal to the Supreme Court (Can C.S., 2015-06-26) 36309).

E. DOCUMENTS REQUESTED TO ALLOW PLAINTIFFS' EXPERTS TO PREPARE THEIR EXPERT REPORT

- 1- All documentation about CVTs that Nissan Canada created for the benefit of its dealers or customers
- 2- Technical bulletins sent to dealers about the CVT
- 3- Correspondence and exchanges between Nissan and its dealers regarding the CVT, including:
 - a. Diagnostics;
 - b. Repair and procedures;
 - c. Declaration and others;
 - d. Memos.
- 4- Any training given to dealers regarding CVTs
- 5- All documents about the CVT that Nissan received from its shareholder Nissan Motor Co Ltd. in Japan
- 6- All documents about the CVT that Nissan received from its parent company Nissan North America Inc
- 7- The document entitled: *The Alliance New Product Quality Procedure (ANPQP)*, concerning the CVT, and all related documents in the possession of Nissan
- 8- All versions of the document entitled: *Product and Process Design Review* regarding the CVT and all related documents in the possession of Nissan including versions 2.3 and 3.0, or their equivalent
- 9- The documents regarding the *Design Review Base on Failure Modes (DRBFM)*, concerning the CVT, or its equivalent
- 10- All the sections concerning the CVT found in the document entitled: *Nissan engineering Manual*, or its equivalent, in the possession of Nissan
- 11- All documents concerning the CVT found in the document entitled *Nissan Design Specifications*, or its equivalent, in the possession of Nissan including the following documents:
 - a. Design document and notes;
 - b. Drawings documents and notes;
 - c. Specifications documents and notes;
 - d. Development test documents and reports;
 - e. C/FMVSS certification test reports.whether in print, computer, audio or video format or any other technological support

[55] The final section concerns documents required by Plaintiffs to allow their experts to prepare their report.

[56] At this stage of the proceedings, most of the requested documents are *prima facie* relevant and their disclosure should be encouraged. The documents are useful, appropriate and likely to advance the debate. However, some of the requests need to be curtailed to be consistent with prior comments in the present judgment.

[57] Nissan states that it is generally open to disclosing these documents but asks that it be given additional time to determine to take a position as to whether these documents exist, whether they are in its possession, whether they can be communicated and, if so, how long it will take to communicate them. Nissan wished to reserve its right to contest the communication of the same following this inquiry.

[58] Granting additional time would not be appropriate in the present case.

[59] Plaintiffs must file their expert report before March 20, 2022. In order to meet this deadline it is necessary that the documents be disclosed as soon as possible.

[60] Furthermore, Nissan has been aware of CVT-related complaints for some time. Lawsuits were filed in the US as early as 2014. Others followed. Given existing disclosure obligations in the US, it would be very surprising if Nissan did not have most of the information ready to be disclosed.

[61] Nissan will be given a period of 60 days to provide the information. If additional time is required, it will need to be justified.

[62] As is the case with the other disclosure orders issued in this judgment, the order regarding documents needed for the expert report will apply only to documents in the custody or under the control of Nissan as well as documents that Nissan is able to obtain through reasonable means. With regard to information that Nissan does not have control over but knows who does, the Court prays act of Nissan's undertaking to identify, if possible, the third party who has access to the requested information.

[63] Finally, Plaintiffs ask that Nissan be ordered to conserve evidence that has been refused at this stage. Such an order is not necessary. Nissan has confirmed that a litigation hold is in effect. Furthermore, the general duty to preserve evidence under sections 20 and 251 C.C.P. provides sufficient security without the need for an order. Nonetheless, as Nissan stated that it had no objection, the court will simply pray act of Nissan's undertaking that it will abide by these obligations.

FOR THESE REASONS, THE COURT:

[64] **ORDERS** Defendant, Nissan Canada Inc., to disclose to Plaintiffs, within 60 days of the present judgment, the following documents which cover the period of March 25, 2010, to the present day:

- A1.1 The list of names and contact information of all group members;
- B1.1 The number of CVT repairs performed outside of the warranty within the Nissan network;
- B1.2 The number of breakdowns and towed vehicles reported to Nissan for reasons related to CVT malfunctions;
- B1.3 Details of such CVT repairs including the year, model and mileage of the vehicle;
- B1.4 The amount charged to each member for these repairs;
- B1.5 The number of such repairs for which Nissan has agreed to pay the full or partial cost;
- B1.6 The cost that Nissan agreed to pay for these repairs;
- B2.1 The number of CVT repairs performed under warranty;
- B2.2 The list of members who have obtained a CVT repair under warranty;
- B2.3 The details of such repairs including the year, model and mileage of the vehicle;
- B2.4 The amount the member paid, if any. For example, and without limitation the cost of oil or transmission filter, cost of diagnosis, etc.;
- C1.1 Service tickets opened at the time the dealer calls Nissan Canada Inc. commonly known as *Tech Hotline Ticket Management* or other similar type document;
- C1.2 CVT-related exchanges between Nissan and its dealers that occurred through the intranet communication system;
- C1.3 Details of CVT-related discounts or rebates granted to class members by Nissan or its dealers, including the amount, model, year and mileage of the vehicle;
- D1.1 Financial statements of Nissan Canada Inc. for the year 2020;
- D2.1 CVT related service tickets opened when a member called Nissan's customer service department;
- D2.2 Written complaints related to CVTs sent to Nissan including *Field Investigation Reports* and/or *Customer Assistance Requests*;

- D2.3 All CVT-related exchanges between Nissan and class members either by letter, email or any other means;
- D2.4 Brochures for each of the Equipped Vehicles;
- D2.5 Press releases issued to the media related to the CVT;
- E1.1 All documentation about CVTs that Nissan Canada created for the benefit of its dealers or customers;
- E1.2 Technical bulletins sent to dealers about the CVT;
- E1.3 CVT-related memos exchanged between Nissan and its dealers;
- E1.4 Details of any training given to dealers regarding CVTs;
- E1.5 All CVT-related documents that Nissan received from its shareholder Nissan Motor Co Ltd. in Japan;
- E1.6 All CVT-related documents that Nissan received from its parent company Nissan North America Inc.;
- E1.7 The CVT-related sections of the document entitled: *The Alliance New Product Quality Procedure (ANPQP)*;
- E1.8 The CVT-related sections of the various versions of the document entitled: *Product and Process Design Review*;
- E1.9 The CVT-related sections of the document entitled *Design Review Base on Failure Modes (DRBFM)*;
- E1.10 The CVT-related sections of the document entitled: *Nissan engineering Manual*;
- E1.11 The CVT-related sections of the document entitled *Nissan Design Specifications* including CVT C/FMVSS certification test reports.

[62] **DECLARES** that any document disclosed further to the present judgment is subject to the implied confidentiality rule *Lac d'Amiante du Québec Ltée v. 2858-0702 Québec Inc.*, 2001 SCC 51;

[65] **ORDERS** Plaintiffs to give Defendant a 30-day prior notice before filing the financial statements of Nissan Canada Inc. into the Court record to allow Defendant to representations on whether measures should be imposed to protect their confidentiality;

[66] **PRAYS ACT** of Defendant's undertaking to advise Plaintiffs of the third party who has access to the above information in the event that the information is not in custody or under the control of Defendant or if Defendant is unable to obtain it through reasonable means;

[67] **PRAYS ACT** of Defendant's undertaking to abide by its duty to preserve relevant evidence (Arts 20 and 251 C.C.P.);

[68] **THE WHOLE** with costs to follow suit.

MARTIN F. SHEEHAN, J.S.C.

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Hearing date: October 20, 2021

ANNEX A – LIST OF REQUESTED DOCUMENTS

A. DOCUMENTS TO FACILITATE THE IDENTIFICATION OF GROUP MEMBERS

- 1- List of names and contact information of all group members

B. DOCUMENTS REQUIRED TO CALCULATE THE AMOUNT PAID BY CLASS MEMBERS FOR THE PURPOSE OF OBTAINING A COLLECTIVE RECOVERY ORDER

B1. FOR REPAIRS PERFORMED OUTSIDE OF THE MANUFACTURER'S WARRANTY AT A NISSAN DEALERSHIP:

- 1- The number of repairs performed outside of the warranty
- 2- The number of breakdowns and towed vehicles reported to Nissan for reasons related to the class action
- 3- Details of such repairs including the year, model and mileage of the vehicle
- 4- The amount of each to the member for each of these repairs
- 5- The number of such repairs for which Nissan has agreed to pay the full or partial cost
- 6- The cost that Nissan has agreed to pay for these repairs
- 7- The form, commonly called good will or other document that the dealer must send to Nissan related to these repairs
- 8- Any internal Nissan document used to analyze such good will or similar type of request

B2. FOR REPAIRS PERFORMED UNDER THE MANUFACTURER'S WARRANTY:

- 1- The number of such repairs
- 2- The list of members who have obtained a repair under warranty
- 3- The details of such repairs including the year, model and mileage of the vehicle

- 4- The amount the member paid, if any. For example, and without limitation the cost of oil or transmission filter, cost of diagnosis, etc.

C. DOCUMENTS NEEDED TO ASSESS THE LEVEL OF NISSAN'S KNOWLEDGE OF THE EXISTING PROBLEMS ON ITS CVT EQUIPPED VEHICLES AND OF GROUP MEMBERS' COMPLAINTS REGARDING SAME

- 4- Service tickets opened at the time the dealer calls Nissan Canada Inc. commonly known as Tech Hotline Ticket Management or other similar type document
- 5- Correspondence and exchanges whether by email, mail or through the intranet communication system, or any other system, between Nissan Canada and its dealers
- 6- Details of discounts or rebates granted to class members by Nissan or its dealers, including the amount, model, year and mileage of the vehicle

D. DOCUMENTS RELEVANT TO PUNITIVE DAMAGES

D1. DOCUMENTS RELATED TO THE EVALUATION OF DEFENDANT'S ASSETS FOR THE PURPOSE OF JUSTIFYING THE AMOUNT OF PUNITIVE DAMAGES WHICH SHOULD AWARD

- 1- Financial statements of Nissan Canada Inc. for the years covered by the class action, including the year 2020

D2. DOCUMENTS RELATED TO DEFENDANT'S BEHAVIOUR IN ORDER TO JUSTIFY A PUNITIVE DAMAGE AWARD

- 1- CVT related service tickets opened when a member calls Nissan's customer service department
- 2- Written complaints related to CVTs sent to Nissan including Field Investigation Reports and/or Customer Assistance Requests
- 3- All exchanges between Nissan and class members, by letter, email or any other means, regarding CVTs
- 4- Documents or information intended for the public, including:
 - e. Advertisements related to Equipped vehicles
 - f. Promotional materials related to Equipped Vehicles
 - g. Brochures for each of the Equipped Vehicles

h. Press releases issued to the media about CVTs

E. DOCUMENTS REQUESTED TO ALLOW PLAINTIFFS' EXPERTS TO PREPARE THEIR EXPERT REPORT

- 1- All documentation about CVTs that Nissan Canada created for the benefit of its dealers or customers
- 2- Technical bulletins sent to dealers about the CVT
- 3- Correspondence and exchanges between Nissan and its dealers regarding the CVT, including:
 - a. Diagnostics;
 - b. Repair and procedures;
 - c. Declaration and others;
 - d. Memos.
- 4- Any training given to dealers regarding CVTs
- 5- All documents about the CVT that Nissan received from its shareholder Nissan Motor Co Ltd. in Japan
- 6- All documents about the CVT that Nissan received from its parent company Nissan North America Inc
- 7- The document entitled: *The Alliance New Product Quality Procedure (ANPQP)*, concerning the CVT, and all related documents in the possession of Nissan
- 8- All versions of the document entitled: *Product and Process Design Review* regarding the CVT and all related documents in the possession of Nissan including versions 2.3 and 3.0, or their equivalent
- 9- The documents regarding the *Design Review Base on Failure Modes (DRBFM)*, concerning the CVT, or its equivalent
- 10- All the sections concerning the CVT found in the document entitled: *Nissan engineering Manual*, or its equivalent, in the possession of Nissan
- 11- All documents concerning the CVT found in the document entitled *Nissan Design Specifications*, or its equivalent, in the possession of Nissan including the following documents:
 - a. Design document and notes;
 - b. Drawings documents and notes;
 - c. Specifications documents and notes;
 - d. Development test documents and reports;
 - e. C/FMVSS certification test reports.whether in print, computer, audio or video format or any other technological support