

SUPERIOR COURT

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No.: 500-06-001053-202

DATE: May 4, 2021

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

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

v.
NISSAN CANADA INC.
Defendant

JUDGMENT

OVERVIEW

[1] Applicants, Association pour la protection automobile (“**APA**”) and Ms. Liliane Rocha, seek permission to file a class action on behalf of customers who purchased or leased a Nissan vehicle equipped with a continuous variable transmission (“**CVT**”). The claim they intend to file seeks compensatory and punitive damages and asks that Nissan Canada Inc. (“**Nissan**”) be compelled to extend its warranty on the CVT.

[2] Nissan partially contests the application on the basis that the class is overly broad and inaccurate.

[3] In particular, Nissan claims that the proposed class should be redefined to exclude:

- 3.1. Vehicles that were not sold in Quebec or are not equipped with a CVT;
- 3.2. Vehicles already covered by a Nissan extended warranty; and
- 3.3. Members who had repairs performed prior to March 15, 2017.

[4] Furthermore, Nissan alleges that the common questions should be reworded to eliminate those vehicles not affected by a defect.

[5] Finally, Nissan pleads that some of the proposed conclusions are inappropriate. Namely, they advance: i) that an order to extend the warranty is not possible under Quebec law; and ii) that any conclusion regarding punitive damages should be excluded given the lack of factual allegations to support such a claim.

CONTEXT

[6] Nissan is the exclusive distributor of Nissan vehicles in Canada.

[7] The Applicant, Ms. Liliane Rocha, alleges that she purchased a Nissan Sentra model year 2013 (the “**Vehicle**”)¹ which is plagued by a defect. Namely, she states that her Vehicle is equipped with a CVT that deteriorates prematurely and requires costly repairs.

[8] Alleging that the majority of vehicles sold by Nissan in Quebec are equipped with a defective CVT, she wishes to represent all potential owners or lessees of CVT-equipped vehicles ranging from model years 2010 to 2019.

[9] In December 2019, Ms. Rocha contacted the Applicant, APA, an association whose mission is to defend consumers’ interests in the automotive industry.

[10] The APA recommended that she try to resolve the issue directly with Nissan. Her efforts in this regard were unsuccessful. The APA then wrote to Nissan to express its concerns about the increasing number of CVT-related customer complaints it was receiving.²

[11] Unsatisfied with Nissan’s response, Ms. Rocha and the APA filed the present Application on March 25, 2020.

¹ Exhibit P-2, Sales Contract dated June 6, 2013; Exhibit P-3, Financing Contract dated June 6, 2013.

² Exhibits P-19 and P-20.

[12] Essentially, Applicants allege that:

- 12.1. Nissan vehicles equipped with CVTs are affected by a latent defect in that they deteriorate prematurely (articles 1726 to 1730 *Civil Code of Quebec* (“**CCQ**”) and articles 53, 54 and 272 of the *Consumer Protection Act* (the “**CPA**”));³
- 12.2. Nissan failed to uphold the legal warranty of quality and durability on CVT-equipped vehicles (sections 37, 38 and 272 of the CPA).

[13] Applicants seek the following relief:

- 13.1. Compensatory damages in the form of:
 - 13.1.1. The reduction of their obligations representing the equivalent of the CVT repair costs for the proposed class members who performed the repairs;
 - 13.1.2. The reimbursement of the average cost for CVT repairs, for the proposed class members who did not proceed with the repairs but sold their vehicles;
 - 13.1.3. Compensation for fees and damages caused by the latent defect;
- 13.2. Extension of the NCI warranty on CVTs for up to 10 years or 200,000 km, whichever comes first;
- 13.3. Punitive damages at \$300 per member.⁴

ANALYSIS

[14] The Court must determine whether the Applicants meet the requirements for the issuance of a class action.

[15] If the answer to this question is yes, then the Court must describe the class whose members will be bound by the class action judgment, appoint a representative plaintiff as well as identify the main issues to be dealt with collectively and the conclusions sought in relation to those issues.

³ *Consumer Protection Act*, CQLR c. P-40.1.

⁴ Re-Modified Application dated February 22, 2021, paras 162 to 165.

1. DO APPLICANTS MEET THE REQUIREMENTS FOR THE AUTHORIZATION OF A CLASS ACTION?

1.1 Conclusion

[16] Considering the low threshold that is applicable at this stage, the requirements are met and the class action is authorized.

1.2 Legal Principles

[17] A class action is a procedure by which a person, the class representative, sues on behalf of all members of a group that have a similar claim. Because the class representative is not specifically mandated to act on behalf of these members, prior authorization of the Court is required before a class action can be filed.⁵

[18] Article 574 CCP provides that an application for authorization to file a class action must set out: i) the facts on which the class action is based; ii) the nature of the class action; and iii) the class on whose behalf the representative intends to act.

[19] According to article 575 CCP, the Court must authorize the class action 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.

[20] The Court's role at the authorization stage has been described as "screening." It must weed out those untenable and frivolous cases that clearly do not meet the requirements for the issuance of class action (article 575 CCP). This being said, the threshold is low. The requirements must be interpreted in a broad and liberal fashion designed to give effect to the social goals of class actions (facilitating access to justice, modifying harmful behaviour and preserving scarce judicial resources). When all four criteria are met, the Court has no discretion to refuse the authorization.⁶

⁵ *L'Oratoire Saint-Joseph du Mont-Royal c. J.J.*, 2019 CSC 35, para. 6.

⁶ *Desjardins Cabinet de services financiers inc. c. Asselin*, 2020 CSC 30, paras. 27 and 55; *L'Oratoire Saint-Joseph du Mont-Royal c. J.J.*, *supra*, note 5, paras. 18, 19, 20, 56 and 58; *Vivendi Canada Inc. v. Dell'Aniello*, 2014 CSC 1, paras. 1 and 37; *Infineon Technologies AG v. Option Consommateurs*,

1.2.1 Similar Issues of Law and Fact (Article 575(1) CCP)

[21] This requirement is usually easy to meet.

[22] It is not required that the claims of group members be identical or that the determination of common issues lead to the complete resolution of the case. A single identical, similar or related question of law is sufficient “provided that it is significant enough to affect the outcome of the class action” or to enable “all the claims to move forward.”⁷

[23] Furthermore, 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.⁸

1.2.2 Allegations That Appear to Justify the Conclusions Sought (Article 575(2) CCP)

[24] With regard to the second criterion, article 575 CCP states that the facts alleged must “appear” to justify the conclusions sought.

[25] Vague, general or imprecise claims are not sufficient to meet this burden. Nor are mere assertions made without factual basis or claims which are hypothetical or purely speculative.⁹

[26] This being said, the applicant, “does not have to show that his claim will probably succeed.” All that is needed is that the applicant demonstrate, on a *prima facie* basis, that there is an arguable case in light of the facts and the applicable law.¹⁰

2013 CSC 59, paras. 59 to 61; *Apple Canada inc. c. Badaoui*, 2021 QCCA 432, para. 25; *Benamor c. Air Canada*, 2020 QCCA 1597, para. 35; *Godin c. Aréna des Canadiens inc.*, 2020 QCCA 1291, paras. 49 and 50; *Tenzer c. Huawei Technologies Canada Co. Ltd.*, 2020 QCCA 633, para. 20; *Belmamoun c. Ville de Brossard*, 2017 QCCA 102, paras. 73 and 74; *Charles c. Boiron Canada inc.*, 2016 QCCA 1716, para. 40 (Motion for leave to appeal to the Supreme Court dismissed with dissent (Can C.S., 2017-05-04) 37366).

⁷ *L’Oratoire Saint-Joseph du Mont-Royal c. J.J.*, *supra*, note 5, paras. 6, 8 and 44; *Vivendi Canada inc. v. Dell’Aniello*, *supra*, note 6, paras. 42, 53 to 59 and 72; *Infineon Technologies AG v. Option consommateurs*, *supra*, note 6, para. 72; *Apple Canada inc. c. Badaoui*, *supra*, note 6, para. 62; *Rozon c. Les Courageuses*, 2020 QCCA 5, para. 74 (Motion for leave to appeal to the Supreme Court dismissed (Can C.S., 2020-11-16) 39115).

⁸ *L’Oratoire Saint-Joseph du Mont-Royal c. J.J.*, *supra*, note 5, para. 44; *Bank of Montreal v. Marcotte*, 2014 SCC 55, paras. 41 to 47.

⁹ *L’Oratoire Saint-Joseph du Mont-Royal v. J.J.*, *supra*, note 5, para. 59; *Infineon Technologies AG v. Option consommateurs*, *supra*, note 6, para. 67; *Charles c. Boiron Canada inc.*, *supra*, note 6, para. 43.

¹⁰ *L’Oratoire Saint-Joseph du Mont-Royal c. J.J.*, *supra*, note 5, para. 58; *Infineon Technologies AG v. Option consommateurs*, *supra*, note 6, paras. 65 and 66.

[27] With regard to the law, the allegations need to be “specific enough to allow the legal syllogism to be considered,” but “it is not necessary to provide step-by-step details of the legal argument.” The allegations may be imperfect but their true meaning may nonetheless be clear. Inferences can be drawn from the allegations.¹¹

[28] With regard to the facts, it is not required to specify in minute detail the evidence that the applicant intends to present on the merits of the case. The allegations of the proposed claim and the exhibits filed in support of them are assumed to be true, unless contradicted by summary and obvious evidence. This presumption applies only to the facts tendered by the applicant, not those tendered in evidence by the respondent.¹²

[29] The authorization stage must be distinguished from the trial on the merits. The merits of the case should only be considered after authorization has been granted.¹³ Authorization judges may decide questions of law when the presentation of additional evidence would not place them in a better position. However, they should refrain from doing so if the decision requires applying the law to findings of fact. Any analysis of the evidence should be deferred to the merits given the frugal and limited evidence available at the authorization stage and the fact that much of the relevant evidence may still be in the hands of the defendant.¹⁴

[30] When several independent causes of action are invoked in support of the application for authorization, the applicant must demonstrate an appearance of right for each of them. Thus, the Court must separately assess the merits of each and authorize only those that meet the condition.¹⁵

1.2.3 The Appropriateness of the Class Action Remedy (Article 575(3) CCP)

[31] Article 575(3) CCP requires that the composition of the class make it “difficult or impracticable” to use other procedural means (for example, a mandate to take part in judicial proceedings on behalf of others (articles 88 and 91 CCP) or consolidation of

¹¹ *Desjardins Cabinet de services financiers inc. c. Asselin*, supra, note 6, paras. 16 and 17.

¹² *L’Oratoire Saint-Joseph du Mont-Royal c. J.J.*, supra, note 5, para. 59; *Infineon Technologies AG v. Option consommateurs*, supra, note 6, para. 67; *Benamor c. Air Canada*, supra, note 6, paras. 35 and 44; *Baratto c. Merck Canada inc.*, 2018 QCCA 1240, para. 48 (Motion for leave to appeal to the Supreme Court dismissed (Can C.S., 2019-03-28) 38338).

¹³ *Desjardins Cabinet de services financiers inc. c. Asselin*, supra, note 13, paras. 16 and 17; *L’Oratoire Saint-Joseph du Mont-Royal v. J.J.*, supra, note 5, paras. 7 and 22; *Vivendi Canada inc. v. Dell’Aniello*, supra, note 6, para. 37; *Infineon Technologies AG v. Option consommateurs*, supra, note 6, paras. 65 and 68.

¹⁴ *Desjardins Cabinet de services financiers inc. c. Asselin*, supra, note 6, para. 55; *L’Oratoire Saint-Joseph du Mont-Royal v. J.J.*, supra, note 5, para. 55; *Pilon c. Banque Amex du Canada*, 2021 QCCA 414, para. 12; *Durand c. Subway Franchise Systems of Canada*, 2020 QCCA 1647, paras. 48 to 54; *Benamor c. Air Canada*, supra, note 6, para. 42; *Godin c. Aréna des Canadiens inc.*, supra, note 6, paras. 53, 54, 55, 93 and 113; *Belmamoun c. Ville de Brossard*, supra, note 6, paras. 81 and 82; *Sibiga c. Fido Solutions inc.*, 2016 QCCA 1299, paras. 76 to 86.

¹⁵ *Belmamoun c. Ville de Brossard*, supra, note 6, para. 77; *Delorme c. Concession A25, s.e.c.*, 2015 QCCA 2017, para. 6.

proceedings (article 143 CCP)). The words “difficult or impracticable” do not mean impossible.¹⁶ The preferability rule does not apply in Quebec and therefore it is not necessary to prove that the class action procedure is the most appropriate procedural vehicle.¹⁷

[32] The Court of Appeal mentions that to satisfy this criterion, the applicant must show that the class action remedy is a “useful” means to achieve the goals sought by the class.¹⁸

[33] When assessing this usefulness, courts can look at the estimated number of members, their geographic location and the applicant’s knowledge of their identity and contact details.¹⁹

[34] When the number of members is important, this is usually sufficient to show that it would be “difficult or impracticable” to proceed otherwise.²⁰

1.2.4 A Representative Who Can Properly Represent the Class Members

[35] This requirement is usually satisfied when the representative is: i) interested in the suit; ii) competent; and iii) has no demonstrated conflict of interest with the group members.²¹

[36] These factors must be interpreted liberally. A representative should not be excluded “unless his or her interest or qualifications is such that the case could not possibly proceed fairly.”²²

[37] The duty previously imposed on the applicant to identify the members of the group has been tempered over time. When it is clear that a large number of consumers are in the same situation as the applicant, it becomes less important to try to identify them.²³

[38] If any doubt persists at the end of the analysis of the four criteria, the doubt must benefit the applicant and the authorization must be granted.²⁴

¹⁶ *Abicidan c. Bell Canada*, 2017 QCCS 1198, para. 82.

¹⁷ *Vivendi Canada inc. v. Dell’Aniello*, *supra*, note 6, para. 67; *Bramante v. McDonald’s*, 2018 QCCS 4852, para. 55 (Request for approval of a settlement agreement granted in part, 2021 QCCS 955).

¹⁸ *D’Amico c. Procureure générale du Québec*, 2019 QCCA 1922, para. 56 (Motion for leave to appeal to the Supreme Court dismissed (Can C.S., 2020-05-14) 39013).

¹⁹ *Abicidan c. Bell Canada*, *supra*, note 16, para. 83.

²⁰ *Valade c. Ville de Montréal*, 2017 QCCS 4299, para. 26.

²¹ *L’Oratoire Saint-Joseph du Mont-Royal c. J.J.*, *supra*, note 5, para. 32; *Infineon Technologies AG v. Option consommateurs*, *supra*, note 6, para. 149; *Tenzer c. Huawei Technologies Canada Co. Ltd.*, *supra*, note 6, para. 30; *Sibiga c. Fido Solutions inc.*, *supra*, note 14, para. 97.

²² *Infineon Technologies AG v. Option consommateurs*, *supra*, note 6, para. 149.

²³ *L’Oratoire Saint-Joseph du Mont-Royal c. J.J.*, *supra*, note 5, para. 31; *Apple Canada inc. c. Badaoui*, *supra*, note 6, para. 29; *Martel c. Kia Canada inc.*, 2015 QCCA 1033, para. 29.

²⁴ *Baratto c. Merck Canada inc.*, *supra*, note 12.

1.3 Discussion

1.3.1 The Proposed Claim

[39] Applicants allege that the CVT installed in Nissan vehicles is plagued by conception and manufacturing defects that cause it to deteriorate prematurely when compared with transmissions of other similar vehicles.²⁵

[40] They add that the problem is widely known and well documented in various consumer guides.²⁶

[41] The correction of this defect is expensive and, according to Applicants, this cost is disproportionate when considering the overall value of the affected vehicles.²⁷ Ms. Rocha states that had she known about this defect, she would not have paid so high a price for her Vehicle.²⁸

[42] Applicants allege that Nissan knew about the problem and in fact, settled various class actions in the US based on similar allegations. However, they state that Nissan failed to take proper corrective action for Quebec consumers, which renders it liable to punitive damages in addition to compensatory damages.²⁹

1.3.2 The Applicable Criteria

[43] Nissan does not contest that criteria 1, 3 and 4 of article 575 CCP are met.

[44] Indeed, the claim raises common questions, the number of members renders other procedural means impracticable³⁰ and Applicants can properly represent the class members.

[45] Nissan also concedes that, with regard to some proposed class members, the facts alleged, “appear to justify the conclusions sought.”

[46] Thus, the class action is authorized.

[47] However, Nissan contests the proposed class description, proposed common questions and proposed conclusions.

²⁵ Re-Modified Application dated February 22, 2021, paras. 11, 12, 13, 21, 35, 135, 136 and 137.

²⁶ Re-Modified Application dated February 22, 2021, paras. 26 and 27; Exhibits P-7 to P-18.

²⁷ Re-Modified Application dated February 22, 2021, paras. 23e), 30 and 34.

²⁸ Re-Modified Application dated February 22, 2021, para. 14.

²⁹ Re-Modified Application dated February 22, 2021, paras. 23, 39.1 to 73.3, 131, 132, 133 and 143.

³⁰ Exhibit P-57.

2. **HOW SHOULD THE COURT DESCRIBE THE CLASS, THE REPRESENTATIVE PLAINTIFF, THE MAIN ISSUES TO BE DEALT WITH COLLECTIVELY AND THE CONCLUSIONS SOUGHT IN RELATION TO THOSE ISSUES?**

[48] Article 576 CCP states that the judgment authorizing a class action must:

- 48.1. describe the classes and subclasses whose members will be bound by the class action judgment;
- 48.2. appoint a representative plaintiff;
- 48.3. identify the main issues to be dealt with collectively and the conclusions sought in relation to those issues; and
- 48.4. determine the district in which the class action is to be instituted.

[49] There is no dispute as to the representatives or the district in which the class action is to be instituted.

[50] The Applicants, the APA and Ms. Liliane Rocha, are appointed as class representatives.

[51] The class action will be heard in the district of Montreal.

[52] This leaves the description of the class, the common questions and the conclusions. On each of these, Nissan opposes the wording proposed by the Applicants.

2.1 Class Description

[53] In *George c. Québec (Procureur général)*,³¹ the Court of Appeal ruled that the description of a proposed class should meet the following requirements:

- 53.1. The definition of the group must be based on objective criteria;
- 53.2. The criteria must have a rational basis;
- 53.3. The group definition must not be circular or imprecise; and
- 53.4. The class definition must not be based on a criterion or criteria that are contingent on the outcome of the class action on the merits.

[54] These requirements need to be respected at the outset of the class action because the group description specifies who is entitled to notices, who is entitled to relief (if relief is granted) and who will be bound by the judgment.

³¹ *George c. Québec (Procureur général)*, 2006 QCCA 1204, para. 40.

[55] Applicants wish to file a class action on behalf of the following group:

| | |
|--|---|
| Any natural person, legal person subject to private law, corporation or association who is or was the owner or lessee in Quebec of a Nissan vehicle equipped with a Continuously Variable Transmission (CVT), of the following models and years: | Toute personne physique, personne morale de droit privé, société ou association qui est ou était propriétaire ou locataire au Québec d'un véhicule de marque Nissan équipé d'une Transmission à variation continue (CVT), de modèle et années suivantes : |
| Altima : | 2010 – 2018 |
| Cube : | 2010 – 2013 |
| Juke : | 2011 – 2017 |
| Quest : | 2011- 2014 |
| Maxima : | 2010 – 2014; 2016 – 2019 |
| Murano : | 2010 – 2019 |
| Pathfinder : | 2013 – 2019 |
| Rogue : | 2010 – 2018 |
| Sentra : | 2010 – 2019 |
| Versa : | 2010 – 2014 |
| Versa Note : | 2014 – 2019 |
| Qashqai : | 2016 – 2017 |
| NV200 : | 2010; 2013 – 2017 |

[56] Nissan contests the proposed class description for the following reasons:

- 56.1. the proposed class includes Nissan vehicles that were not sold in Quebec with a CVT;
- 56.2. some of the included vehicles remain covered by Nissan's Powertrain Limited Warranty or a Limited Warranty;
- 56.3. some of the proposed class members have had repairs performed prior to March 15, 2017, hence, their individual claims are prescribed.

[57] These arguments will be considered in turn.

2.1.1 The Inclusion of Nissan Vehicles That Were not Sold in Quebec With a CVT

[58] According to Nissan, the NV200 2010 and the Qashqai 2016 were not sold with a CVT in Quebec.³²

[59] At the hearing, counsel for the Applicants agreed to remove these vehicles from the proposed class.

[60] These vehicles will therefore be removed.

2.1.2 The Inclusion of Vehicles Covered Under an Extended Warranty

[61] Nissan alleges that some of the vehicles are already covered by an extended warranty.

[62] For example:

62.1. All Nissan vehicles are covered by a Powertrain Limited Warranty which ends after 5 years or 100,000 km whichever comes first. This warranty covers defects in material or workmanship affecting the transmission.³³ Because most 2016 and virtually all 2017 to 2019 models remain covered by this warranty, Nissan notes that any class member having issues with its CVT on these vehicles would be eligible for a free replacement.

62.2. In November 2009, Nissan voluntarily extended its warranty on all vehicles of model years 2003 to 2010 for 10 years / 200,000 km.³⁴

62.3. In January 2017, Nissan extended the warranty on Pathfinder model years 2013 and 2014 to 7 years / 135,000 km.³⁵

[63] Nissan argues that these vehicles should all be excluded.

[64] There are three potential issues with this argument.

[65] The first is that Applicants claim these warranties are insufficient. They allege that the CVT should last at least 10 years or 200,000 km. Applicants note that in most US settlements, class members obtained a 10 years / 200,000 km extended warranty.

[66] The second issue is that the extended warranties do not cover all of the potential damages claimed by the class members. For example, it excludes damages for loss of

³² Exhibit LH-12, Affidavit of Lloyd Hillier, paras. 21 to 22.

³³ Exhibit LH-12, Affidavit of Lloyd Hillier, paras. 25 to 27; Exhibits LH-1.1 to LH-8.2 and LH-9.1 to LH-9.5.

³⁴ Exhibit LH-12, Affidavit of Lloyd Hillier, paras. 31 to 32; Exhibits LH-10.1 and LH-10.2.

³⁵ Exhibit LH-12, Affidavit of Lloyd Hillier, paras. 31 to 32; Exhibit LH-11.

use, rental vehicles, transportation costs, etc. These costs are specifically included in Applicants' claim.³⁶

[67] Finally, the warranty would not address Applicants claim for punitive damages discussed below.

[68] Therefore, while the existence of extended warranties on certain model year vehicles may serve to mitigate the damages suffered by those class members who owned or leased such vehicles, it is not a sufficient argument to have these members excluded from the class.

[69] The evaluation of damages sought is best left to the trial judge who will have the benefit of the overall evidence.

2.1.3 Some of the Damages Are Prescribed

[70] The application was filed on March 25, 2020. Thus, Nissan alleges that any repairs performed prior to March 15, 2017,³⁷ are prescribed.

[71] It is true that manufacturing defects are subject to a three-year prescription, which begins at the date of knowledge of the defect.³⁸

[72] However, in a hidden defect's case, when the damage manifests itself gradually or belatedly, prescription only runs from the moment when the victim is aware of the nature of the damage as well as the seriousness and the extent of the defect.³⁹

[73] Moreover, prescription can be interrupted when there is "acknowledgement of a right."⁴⁰ This can occur, for example, when there are customer complaints coupled with attempts by the manufacturer to correct the problem.⁴¹

[74] The issue of the proposed class members' knowledge of the defect and of its seriousness is a highly factual one, which does not lend itself to a summary analysis required at the authorization stage.⁴²

³⁶ Re-Modified Application dated February 22, 2021, para. 123.

³⁷ The date of March 15, 2017, is the date on which the ministerial order instituted in light of the pandemic was in effect ordering the suspension of prescription delays.

³⁸ Art. 2925 CCQ; *Gosselin c. Centre du camping Rémillard Inc.*, 2001 CanLII 18975 (QC CA), para. 8.

³⁹ Art. 1739 and 2926 CCQ; *Garand c. Fiducie Elena Tchouprounova*, 2018 QCCA 876, paras. 4 to 6; *Daunais c. Honda Canada inc.*, 2019 QCCS 621, para. 43.

⁴⁰ Art. 2898 CCQ.

⁴¹ *Gosselin c. Centre du camping Rémillard Inc.*, *supra*, note 38, para. 8.

⁴² *Nadon c. Anjou (Ville)*, 1995 CanLII 5552 (QC CA); *Daunais c. Honda Canada inc.*, *supra*, note 39, para. 43; Marie ST-PIERRE, « L'autorisation d'exercer l'action collective (art. 574-578) » in Denis FERLAND and Benoît EMERY, *Précis de procédure civile du Québec*, 6^e éd., vol. 1, Montréal, Éditions Yvon Blais, 2020, para. 2-1759; Céline GERVAIS, *La Prescription*, Cowansville, Éditions Yvon Blais, 2009, pp. 106 and 107.

[75] The same applies with regard to Applicants' argument with regard to interruption of prescription.

[76] In a recent decision, which raised an issue of prescription interruption in a situation similar to the present one, the court ruled that it would be imprudent to dismiss most of class members' claims based on prescription without the benefit of complete evidence.⁴³

[77] This being said, because Applicants allege that the CVT should properly function for a period of ten years, they agree to limit the class to those vehicles purchased after March 25, 2010. The class is modified to add this requirement.

2.2 Common Questions and Conclusions sought

[78] Nissan contests the wording of some common questions and conclusions.

[79] Firstly, Nissan pleads that the common questions should be reworded to eliminate those vehicles not affected by a defect.

[80] Secondly, it advances that an order to extend the warranty is not a possible remedy under the CCQ or the CPA.

[81] Finally, it states that any conclusion regarding punitive damages should be excluded given the lack of factual allegations to support such a claim.

2.2.1 Vehicles Not Affected by a Defect

[82] In his examination, the APA representative conceded that not all CVTs on Nissan vehicles would fail prior to the expiration of the 10 years / 200,000 km deadline.⁴⁴

[83] Therefore, Nissan asks that the common questions be modified to reflect the fact that some of the vehicles included in the class are not defective. Nissan argues that only class members who: i) have suffered (or will suffer) a mechanical failure; and ii) have incurred (or will incur) repair costs prior to the expiration of the 10 years / 200,000 km deadline should be included in the proposed class.

[84] This mischaracterizes Applicants' allegation. These allegations, which at this stage must be taken as true, state that the CVTs deteriorate prematurely. Thus, the fact that the CVT fails is not determinative. If a CVT has deteriorated prematurely to the extent that at the end of the deadline, it has deteriorated more than a transmission on a similar vehicle, this could constitute a defect that affects the value of the vehicle and causes damages to class members.

⁴³ *Gaudette c. Whirlpool Canada*, 2020 QCCS 1423, para. 76.

⁴⁴ Examination of Mr. George Iny, January 15, 2021, pp. 20 and 21.

[85] At the authorization stage, the judge must pay particular attention, not only to the facts alleged, but also to the inferences or presumptions of fact or law that may be drawn from them and that may serve to establish the existence of an arguable case.⁴⁵

[86] Thus, it would not be appropriate to indirectly exclude vehicles that may not fail prior to the 10-year deadline.

[87] Furthermore, doing so would make it impractical for potential class members to determine if they are included in the group and if they will eventually be bound by the judgment on the merits.

[88] The judge on the merits will be in a better position to determine if the class should be modified or divided it into subgroups, if necessary, should the evidence demonstrate that the situation requires such modifications.

2.2.2 The Possibility of Ordering a Warranty Extension

[89] Secondly, Nissan alleges that the order sought for an extension of the warranty is not one of the available options under the CCQ or the CPA. It asks that this conclusion be reworded. Nissan concedes that it could be appropriate to order it to repair a CVT that fails prior to its anticipated life expectancy.

[90] Applicants respond that there is no practical distinction between an order to extend the warranty and an order forcing the repair if the part fails. They plead that both orders are a way to force specific execution of Nissan's obligation to guarantee that the goods it sells can be used for the purpose for which they are normally intended and for a reasonable period of time in view of their price.

[91] Forced execution is an available remedy both under the CCQ⁴⁶ and the CPA.⁴⁷ Applicants add that this conclusion is advantageous to Nissan as it would force them only to replace the CVTs that actually fail before their anticipated life expectancy.

[92] Given the argument, Nissan has made above to the effect that only those vehicles equipped with CVTs that fail should be covered, one would assume that Nissan would agree to this compromise.

[93] In any event, the Court believes it would be more appropriate for the judge seized with the merit of the application to decide on the proper remedy if and when a defect is established.

[94] Thus, the possible conclusions will reflect both the possibility of a repair order or an extension of the warranty.

⁴⁵ *L'Oratoire Saint-Joseph du Mont-Royal c. J.J., supra*, note 5, para. 24.

⁴⁶ Art. 1590 CCQ.

⁴⁷ Art. 272 CPA

2.2.3 Punitive Damages

[95] Finally, Nissan alleges that the alleged facts do not support a claim for punitive damages.

[96] Punitive damages can only be awarded when they are “provided for by law.”⁴⁸

[97] Here, Applicants rely on article 272 of the CPA, which provides for the possibility of punitive damages if the merchant fails to fulfil an obligation, imposed them by the CPA.

[98] The Supreme Court of Canada⁴⁹ has stated that such damages have a preventive objective. Their purpose is “to discourage the repetition of undesirable conduct.” They may only 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.”⁵⁰

[99] Such a factual analysis of the overall circumstances would be inappropriate to conduct at the authorization stage.

[100] While it is true that courts have sometimes denied claims for punitive damages at the authorization stage, they have usually done so in the absence of factual allegations demonstrating intentional violations or carelessness⁵¹ or in the presence of a manufacturer’s timely recall.⁵²

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

- 101.1. Nissan has known about the manufacturing defect in the transmissions of its vehicles for several years;
- 101.2. Nissan has not acted or assisted its customers despite requests from Applicants and potential class members;
- 101.3. 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;

⁴⁸ Art. 1621 CCQ.

⁴⁹ *Richard v. Time Inc.*, 2012 SCC 8.

⁵⁰ *Id.*, para. 180.

⁵¹ *Karras c. Société des loteries du Québec*, 2019 QCCA 813, paras. 48 and 49; *Perreault c. McNeil PDI inc.*, 2012 QCCA 713, paras. 75 and 76 (Motion for leave to appeal to the Supreme Court dismissed (Can C.S., 2012-10-25) 34877).

⁵² *Paquette c. Samsung Electronics Canada Inc.*, 2020 QCCS 1160, paras. 43 to 45.

101.4. Nissan extended its warranty in the United States as a result of lawsuits against its US subsidiary, but, other than for certain Pathfinders models, it has refused to do so for Canadian and Quebec consumers;

101.5. 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.⁵³

[102] Without deciding on the appropriateness of punitive damages in the present case, it suffices to note that these allegations, if proven, could possibly lead a court to decide that the claim for punitive damages fulfils the requirements of the test set out by the Supreme Court of Canada.

[103] Thus, the questions to be dealt collectively and conclusions will be substantially as stated in the Re-Amended Application with minor adjustments.

CONCLUSION

[104] The class action is authorized.

[105] The proposed class is modified to exclude vehicles not sold in Quebec with a CVT and to exclude vehicles purchased or leased prior to March 25, 2010.

[106] With regard to the questions surrounding notices and disclosure of information, the Court will convene the parties to a case management hearing in the event they cannot agree on same.

FOR THESE REASONS, THE COURT:

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| <p>[107] GRANTS the Re-modified application in part;</p> | <p>ACCORDE en partie la Demande re-modifiée;</p> |
| <p>[108] AUTHORIZES the bringing of a class action in the form of an originating application in damages and declaratory judgment;</p> | <p>AUTORISE l'introduction d'une action collective sous la forme d'une demande introductive d'instance en dommages-intérêts et en jugement déclaratoire;</p> |

⁵³ Re-modified Application dated February 22, 2021, para. 143.

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| <p>[109] APPOINTS Applicants, Ms. Liliane Rocha and Association pour la protection automobile, as representative plaintiffs of the persons included in the following class:</p> <p>Any natural person, legal person subject to private law, corporation or association who, after March 25, 2010, purchased or leased in Quebec a Nissan vehicle equipped with a Continuously Variable Transmission (CVT), of the following models and years:</p> | <p>ATTRIBUE aux demandereses, Mme Liliane Rocha et Association pour la protection automobile, le statut de représentant des personnes comprises dans le groupe ci-après décrit :</p> <p>Toute personne physique, personne morale de droit privé, société ou association qui, après le 25 mars 2010, a acheté ou loué à long terme au Québec un véhicule de marque Nissan équipé d'une Transmission à variation continue (CVT), de modèle et années suivantes :</p> |
| <p>Altima :</p> | <p>2010 – 2018</p> |
| <p>Cube :</p> | <p>2010 – 2013</p> |
| <p>Juke :</p> | <p>2011 – 2017</p> |
| <p>Quest :</p> | <p>2011- 2014</p> |
| <p>Maxima :</p> | <p>2010 – 2014; 2016 – 2019</p> |
| <p>Murano :</p> | <p>2010 – 2019</p> |
| <p>Pathfinder :</p> | <p>2013 – 2019</p> |
| <p>Rogue :</p> | <p>2010 – 2018</p> |
| <p>Sentra :</p> | <p>2010 – 2019</p> |
| <p>Versa :</p> | <p>2010 – 2014</p> |
| <p>Versa Note :</p> | <p>2014 – 2019</p> |
| <p>Qashqai :</p> | <p>2017</p> |
| <p>NV200 :</p> | <p>2013 – 2017</p> |
| <p>as more particularly described in the table attached as Annex A;</p> | <p>tel que décrit plus précisément dans le tableau joint et identifié comme étant l'Annexe A;</p> |
| <p>[110] IDENTIFIES the principal questions of fact and law to be treated collectively as the following:</p> <p>a) Do the transmission problems in the vehicles identified in the class description constitute a latent defect?</p> | <p>IDENTIFIE les principales questions de fait et de droit à être traitées collectivement comme suit :</p> <p>a) Est-ce que les problèmes de transmission dans les véhicules</p> |

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| <p>b) If so, does this defect affect the reasonable durability of the transmission?</p> <p>c) If so, is the Defendant liable for this defect under the <i>Consumer Protection Act</i> and under the <i>Civil Code of Quebec</i>?</p> <p>d) Are class members affected by this latent defect in their vehicle entitled to reimbursement of costs incurred to repair the transmission?</p> <p>e) Are class members entitled to compensatory damages?</p> <p>f) Are class members entitled to an extension of the basic transmission warranty for up to 10 years or 200,000 km or to a repair order if the transmission breaks down during the same period?</p> <p>g) Are class members, who qualify as consumers, entitled to punitive damages of \$300 per Member from Defendant?</p> | <p>identifiés dans la description du groupe constituent un vice caché?</p> <p>b) Si oui, est-ce que ce vice affecte la durabilité raisonnable de la transmission?</p> <p>c) Si oui, est-ce que la défenderesse est responsable de ce défaut en vertu de la <i>Loi sur la protection du consommateur</i> et en vertu du <i>Code civil du Québec</i>?</p> <p>d) Est-ce que les membres du groupe affecté par ce vice caché sur leur véhicule ont le droit au remboursement des frais encourus pour la réparation de la transmission?</p> <p>e) Est-ce que les membres du groupe ont le droit à des dommages compensatoires?</p> <p>f) Est-ce que les membres du groupe ont le droit à une prolongation de la garantie de base sur la transmission jusqu'à 10 ans ou 200 000 km ou à une ordonnance de réparation en cas de bris durant la même période?</p> <p>g) Est-ce que les membres du groupe, qui se qualifient comme consommateurs, ont droit à des dommages punitifs à raison de 300 \$ par membre de la part de la défenderesse?</p> |
| <p>[111] IDENTIFIES the conclusions sought by the class action to be instituted as being the following:</p> <p>GRANT the class action for all class members;</p> <p>ORDER the reduction of the obligations of those class members</p> | <p>IDENTIFIE les conclusions recherchées par l'action collective à intenter comme étant les suivantes :</p> <p>ACCUEILLIR l'action collective pour tous les membres du groupe;</p> <p>ORDONNER la réduction des obligations des membres du groupe</p> |

who had their transmissions repaired, the equivalent of the cost of the repair incurred plus applicable taxes, and ORDER the collective recovery of such amounts;

ORDER Defendant to reimburse class members who experienced a breakdown or malfunction and did not have it repaired prior to selling the vehicle, the average price of the transmission repair;

ORDER the Defendant to extend the warranty on the transmission of its vehicles covered by the action to 10 years or 200,000 km, whichever comes first, without any further conditions or, in the alternative, ORDER the Defendant to repair the transmission of the vehicles covered by the class action if the transmission breaks down during the same period;

ORDER the Defendant to reimburse each of the consumer members the amount of \$300, unless otherwise agreed, as punitive damages; and ORDER the collective recovery of these amounts;

ORDER the Defendant to reimburse the class members for the costs incurred and damages suffered as a result of the manufacturing defect in the transmission of their vehicle, and ORDER the individual recovery of these amounts;

ORDER the Defendant to pay the class members interest at the legal rate plus the additional indemnity provided for in Article 1619 of the *Civil Code of Quebec*, from the date of Applicants' demand letter on December 17, 2019;

qui ont fait réparer la transmission de leur véhicule, l'équivalent du coût de la réparation encouru plus les taxes applicables, et ORDONNER le recouvrement collectif de ces sommes;

ORDONNER à la défenderesse de rembourser aux membres du groupe qui ont connu un bris ou un mauvais fonctionnement et qui ne l'ont pas fait réparer avant de vendre le véhicule, le prix moyen de la réparation de la transmission;

ORDONNER à la défenderesse de prolonger la garantie sur la transmission des véhicules visés par l'action jusqu'à 10 ans ou 200 000 km selon la première éventualité sans aucune autre condition ou, subsidiairement, ORDONNER à la défenderesse de réparer la transmission des véhicules visés par l'action en cas de bris durant la même période;

CONDAMNER la défenderesse à rembourser à chacun des membres consommateurs un montant de 300 \$, sauf à parfaire, à titre de dommages punitifs; et ORDONNER le recouvrement collectif de ces sommes;

CONDAMNER la défenderesse à rembourser aux membres du groupe les frais encourus et les dommages subis en raison du vice de fabrication de la transmission de leur véhicule, et ORDONNER le recouvrement individuel de ces montants;

CONDAMNER la défenderesse à payer aux membres du groupe des intérêts au taux légal plus l'indemnité additionnelle prévue à l'article 1619 du

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| <p>THE WHOLE with costs, including the costs of notices, experts and administration.</p> | <p><i>Code civil du Québec</i> à compter de la date de la mise en demeure des demanderessees du 17 décembre 2019;</p> <p>LE TOUT avec frais de justice, y compris les frais d'avis, d'experts et d'administration.</p> |
| <p>[112] CONVENES the parties to a further hearing to hear representations on the request for information, the content of the notices required under article 579 of the <i>Civil Code of Procedure</i>, the appropriate communication or publication of the said notice and the appropriate delay for a class member to request exclusion, such hearing to take place within 60 days of the present judgment, on a date to be determined between the parties and the Court;</p> | <p>CONVOQUE les parties à une audience afin d'entendre leurs représentations quant aux demandes de documents, le contenu de l'avis requis en vertu de l'article 579 du <i>Code de procédure civile</i>, la communication ou la publication appropriée dudit avis et le délai approprié pour qu'un membre du groupe demande l'exclusion, une telle audience doit avoir lieu dans les 60 jours du présent jugement, à une date à être déterminée entre les parties et le Tribunal;</p> |
| <p>[113] DECLARES that all members of the Class that have not requested their exclusion are bound by any judgment to be rendered on the class action to be instituted in the manner provided for by the law;</p> | <p>DÉCLARE que tous les membres du Groupe qui n'ont pas demandé leur exclusion sont liés par tout jugement à rendre sur l'action collective à intenter de la manière prévue par la loi;</p> |
| <p>[114] DECLARES that the class action will be heard in the district of Montreal.</p> | <p>DÉCLARE que l'action collective sera entendue dans le district de Montréal.</p> |
| <p>[115] THE WHOLE with costs.</p> | <p>LE TOUT avec les frais de justice.</p> |

MARTIN F. SHEEHAN, J.S.C.

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Hearing date: April 6, 2021

ANNEX A

| Vehicle Model year | 2010 | 2011 | 2012 | 2013 | 2014 | 2015 | 2016 | 2017 | 2018 | 2019 |
|--------------------|------|------|------|------|------|------|------|------|------|------|
| Altima | X | X | X | X | X | X | X | X | X | |
| Cube | X | X | X | X | | | | | | |
| Juke | | X | X | X | X | X | X | X | | |
| Kicks | | | | | | | | | | |
| Quest | | X | X | X | X | | | | | |
| Maxima | X | X | X | X | X | | X | X | X | X |
| Murano | X | X | X | X | X | X | X | X | X | X |
| Pathfinder | | | | X | X | X | X | X | X | X |
| Rogue | X | X | X | X | X | X | X | X | X | |
| Sentra | X | X | X | X | X | X | X | X | X | X |
| Versa | X | X | X | X | X | | | | | |
| Versa Note | | | | | X | X | X | X | X | X |
| Qashqai | | | | | | | | X | | |
| NV200 | | | | X | X | X | X | X | | |