

CANADA

(Class Action)
SUPERIOR COURT

PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

D. TANNER

NO: 500-06-000429-080

Petitioner

-vs.-

NISSAN CANADA INC.

Respondent

**AMENDED MOTION TO AUTHORIZE THE BRINGING OF A CLASS ACTION
&
TO ASCRIBE THE STATUS OF REPRESENTATIVE
(Art. 1002 C.C.P. and following)**

TO THE HONOURABLE MADAM JUSTICE DANIÈLE MAYRAND OF THE
SUPERIOR COURT, SITTING IN AND FOR THE DISTRICT OF MONTREAL,
YOUR PETITIONER STATES AS FOLLOWS:

GENERAL PRESENTATION

The Action

1. Petitioner wishes to institute a class action on behalf of the following group, of which he is a member, namely:

National Class

- all residents in Canada, excluding British Columbia, who purchased or leased a Nissan or Infinity vehicle, or any other group to be determined by the Court;

Alternately (or as a Quebec Sub-Class)

- all residents in Quebec who purchased or leased a Nissan or Infinity vehicle, or any other group to be determined by the Court;

United States and British Columbia

2. The paragraphs to follow appear more fully from various Class Action Complaints instituted in the United States:



- a. District Court for the Central District of California on November 30th 2007;
- b. District Court for the Northern District of California on July 25th 2007;
- c. District Court for the Eastern District of Michigan November 27th 2007;
- d. District Court for the Eastern District of Pennsylvania on November 14^h 2007;
- e. District Court for the Eastern District of Texas on November 16th 2007;

Copies of which are attached hereto as **Exhibit R-1** *en liasse*;

3. Further, an action was taken in the Supreme Court of British Columbia on January 22nd 2008; a copy of which is attached hereto as **Exhibit R-2**;
4. In these actions, the class contends that the Respondent designed, manufactured, distributed, marketed and sold motor vehicles under the brand names Nissan and Infinity with an odometer which inflates the represented distance travelled by a factor of at least 2.0%;
5. In so doing, the Respondent has deprived class members of:
 - a) the full benefit of the standard warranties;
 - b) the full benefit of any extended warranties;
 - c) the full benefit of any used warranties;
 - d) the full benefit of their allotted kilometer allowance under a lease;
 - e) a reduction in the resale value of their vehicles
6. Therefore, the Class members have suffered damages as they would not have purchased the motor vehicle's with a defective odometer or would not have paid such a high price;

Canada and Quebec

7. Petitioner contends that the same defective and over-stating odometers have been installed and used in the Nissans and Infinitis in Canada and Quebec;
- 7.1 More specifically, the Respondent intentionally adopted a uniform, biased odometer performance standard that accelerates the odometers installed in all of their vehicles;

8. By reason of Respondent's acts and omissions, Petitioner and the members of the group suffered damages that they wish to claim;
- 8.1 More particularly, the Respondent's scheme already has deprived (and will continue to deprive) the Plaintiff and Class Members of the benefits of their bargains by:
- i) installing faulty odometers in their vehicles,
 - ii) shortening their warranties,
 - iii) diminishing the number of kilometres allowed to be driven under their leases without penalty, thereby causing them to pay excess mileage charges, and/or
 - iv) diminishing the resale value of their vehicles;
- 8.2 As a result of their scheme, the Respondent stands to reap, have reaped and will continue to reap financial benefits in the form of:
- a) the manufacturing cost of installing odometers in their vehicles that accurately record the mileage driven,
 - b) warranty repair savings and/or
 - c) Excess lease mileage charges, all to the financial detriment of the Plaintiff and the Class Members;

The Respondent

9. Respondent Nissan Canada Inc. is a wholly owned subsidiary of the Japanese Company Nissan Motor Company, Ltd. and the American Company Nissan North America, Inc., the whole as more fully appears from a copy of the Quebec Inspector General of Financial Institutions Report attached hereto as **Exhibit R-3**;
10. Respondent Nissan Canada Inc. is the Canadian arm which puts the motor vehicles Nissan and Infiniti onto the marketplace in Canada and Quebec;

FACTS GIVING RISE TO AN INDIVIDUAL ACTION BY THE PETITIONER

11. Petitioner purchased a 2005 Nissan Ultima 2.5L Special;
12. Petitioner received the basic 60,000 kilometer warranty with his vehicle;

13. Respondent impliedly warranted to the Petitioner that the vehicle's odometer would accurately record the number of kilometers driven; Petitioner has discovered that the odometer does not;
- 13.1 In particular, the Petitioner became suspicious when he noticed a discrepancy between his GPS and his car's speedometer. The speed on his vehicle's speedometer was consistently faster than the speed that was registering on his GPS system;
- 13.2 In order to test his vehicle's odometer, the Petitioner looked at markers on the side of the highway and noticed that his odometer had registered more kilometres than the difference between the highway markers indicated;
- 13.3 This in turn, led the Petitioner to research this issue on the internet. The Petitioner then came across an article that reported such odometer over-registration in a test performed by CBS and the Society of Automotive Engineers, produced herein as **Exhibit R-4**, as well as, the existence of various class action lawsuits in the US and British Columbia (referred to in paragraphs 2 and 3 above);
- 13.4 Since the institution of the present action, the Petitioner has validated his claims made herein through empirical testing performed by a Forensic Engineer with extensive experience in automotive mechanical, electrical, and electronic systems, who after real-life testing concluded that the Respondent has a "systemic bias toward odometer over-registration", the same conclusion that CBS and the Society of Automotive Engineers concluded, the whole as appears more fully from a copy of the report of Mike Leshner, P.E., produced herein as **Exhibit R-5**;
14. Petitioner would not have purchased the vehicle or would not have paid such a high price had he known about the defect;
15. In consequence of the foregoing, Petitioner is justified in claiming damages as outlined in paragraph 8.1 above;

FACTS GIVING RISE TO AN INDIVIDUAL ACTION BY EACH OF THE MEMBERS OF THE GROUP

16. Every member of the group has either purchased or leased a Nissan or Infiniti vehicle (...);
17. None of the members of the class were aware of the defect to the odometer at the time of purchase;



18. Each member of the group is justified in claiming for damages as outlined in paragraph 8.1 above;

CONDITIONS REQUIRED TO INSTITUTE A CLASS ACTION

19. The composition of the group makes the application of article 59 or 67 C.C.P. impracticable for the following reasons:

- a) The number of persons included in the group is estimated at well over 1000;
- b) The names and addresses of persons included in the group are not known to the Petitioner but the Respondent has records of this information in their possession ;
- c) All the facts alleged in the preceding paragraphs make the application of articles 59 or 67 C.C.P. impossible;

19.1 The sale of Nissan and Infiniti vehicles is widespread in Quebec and Canada;

19.2 Class members are numerous and are scattered across the entire province and country;

19.3 In addition, given the costs and risks inherent in an action before the courts, many people will hesitate to institute an individual action against the Respondent. Even if the class members themselves could afford such individual litigation, the court system could not as it would be overloaded. Further, individual litigation of the factual and legal issues raised by the conduct of Respondent would increase delay and expense to all parties and to the court system;

19.4 Also, a multitude of actions instituted in different jurisdictions, both territorial (different provinces) and judicial districts (same province), risks having contradictory judgements on questions of fact and law that are similar or related to all members of the class;

19.5 These facts demonstrate that it would be impractical, if not impossible, to contact each and every member of the class to obtain mandates and to join them in one action;

19.6 In these circumstances, a class action is the only appropriate procedure for all of the members of the class to effectively pursue their respective rights and have access to justice;



20. The recourses of the members raise identical, similar or related questions of fact or law, namely:

- a.1) Did the Defendant adopt and implement a uniform odometer performance standard for all of their vehicles?
- a.2) Does the odometer performance standards adopted and implemented by the Defendant cause errors of odometer over-registration?
- a) Did the Defendant knowingly or negligently fail to design the odometer to accurately record the kilometres traveled in favour of over-registration?
- b) Did the Defendant knowingly or negligently fail to manufacture the odometer to accurately record the kilometres actually traveled in favour of over-registration?
- c) Did the Defendant fail to design and conduct tests or failed to disclose the results of such tests that would have disclosed the defect in favour of over-registration?
- d) Did the Defendant knowingly or negligently incorporate materials and parts into the design and manufacture of the odometer that were inappropriate for its intended use?
- e) Did the Defendant knowingly or negligently set a tolerance standard in the defective odometers that allows errors which inflate the kilometers driven?
- f) Did the Defendant knowingly or negligently distribute, market, sell, and/or service a product that they knew or ought to have known was defective?
- g) Were Class Members prejudiced by the Defendant's conduct, and, if so, what is the appropriate measure of these damages?
- h) Is the Defendant liable to pay compensatory, moral, punitive and/or exemplary damages to Class Members, and, if so, in what amount?

21. The interests of justice favour that this motion be granted in accordance with its conclusions;

NATURE OF THE ACTION AND CONCLUSIONS SOUGHT

22. The action that Petitioner wishes to institute for the benefit of the members of the class is an action in liability;

23. The conclusions that Petitioner wishes to introduce by way of a motion to institute proceedings are:

GRANT the class action of the Petitioner and each of the members of the class;

CONDEMN the Defendant to pay to each member of the class a sum to be determined in compensation of the damages suffered, and ORDER collective recovery of these sums;

CONDEMN the Defendant to pay to each of the members of the class, punitive damages, and ORDER collective recovery of these sums;

CONDEMN the Defendant to pay interest and additional indemnity on the above sums according to law from the date of service of the motion to authorize a class action;

ORDER the Defendant to deposit in the office of this court the totality of the sums which forms part of the collective recovery, with interest and costs;

ORDER that the claims of individual class members be the object of collective liquidation if the proof permits and alternately, by individual liquidation;

CONDEMN the Defendant to bear the costs of the present action including expert and notice fees;

RENDER any other order that this Honourable court shall determine and that is in the interest of the members of the class;

24. Petitioner suggests that this class action be exercised before the Superior Court of justice in the district of Montreal for the following reasons:

- a) A great number of the members of the group resides in the judicial district of Montreal and in the appeal district of Montreal;
- b) Respondent has its principal place of business in the district of Montreal;
- c) His attorneys practice their profession in the judicial district of Montreal;

25. Petitioner, who is requesting to obtain the status of representative, will fairly and adequately protect and represent the interest of the members of the group for the following reasons:

- a) He has purchased a Nissan vehicle during the class period and is a member of the class;

- b) He understands the nature of the action;
- c) He is available to dedicate the time necessary for an action and to collaborate with members of the group;
- d) His interests are not antagonistic to those of other members of the group;

25.1 Petitioner is ready and available to manage and direct the present action in the interest of the members of the class that he wishes to represent and is determined to lead the present dossier until a final resolution of the matter, the whole for the benefit of the class;

25.2 Petitioner has the capacity and interest to fairly and adequately protect and represent the interest of the members of the class;

25.3 Petitioner has given the mandate to his attorneys to obtain all relevant information with respect to the present action and intends to keep informed of all developments;

25.4 Petitioner is in good faith and has instituted this action for the sole goal of having his rights, as well as the rights of other class members, recognized and protecting so that they may be compensated for the damages that they have suffered as a consequence of the Respondent's conduct;

25.5 Petitioner has given instructions to his attorneys to put information about this class action on its website and to collect the coordinates of those class members that wish to be kept informed and participate in any resolution of the present matter, the whole as will be shown at the hearing;

26. The present motion is well founded in fact and in law.

FOR THESE REASONS, MAY IT PLEASE THE COURT:

GRANT the present motion;

AUTHORIZE the bringing of a class action in the form of a motion to institute proceedings in damages;

ASCRIBE the Petitioner the status of representative of the persons included in the group herein described as:

National Class

- all residents in Canada, excluding British Columbia, who purchased or leased a Nissan or Infinity vehicle, or any other group to be determined by the Court;

Alternately (or as a Quebec Sub-Class)

- all residents in Quebec who purchased or leased a Nissan or Infinity vehicle, or any other group to be determined by the Court;

IDENTIFY the principle questions of fact and law to be treated collectively as the following:

- a.1) Did the Defendant adopt and implement a uniform odometer performance standard for all of their vehicles?
- a.2) Does the odometer performance standards adopted and implemented by the Defendant cause errors of odometer over-registration?
 - a) Did the Defendant knowingly or negligently fail to design the odometer to accurately record the kilometres traveled in favour of over-registration?
 - b) Did the Defendant knowingly or negligently fail to manufacture the odometer to accurately record the kilometres actually traveled in favour of over-registration?
 - c) Did the Defendant fail to design and conduct tests or failed to disclose the results of such tests that would have disclosed the defect in favour of over-registration?
 - d) Did the Defendant knowingly or negligently incorporate materials and parts into the design and manufacture of the odometer that were inappropriate for its intended use?
 - e) Did the Defendant knowingly or negligently set a tolerance standard in the defective odometers that allows errors which inflate the kilometres driven?
 - f) Did the Defendant knowingly or negligently distribute, market, sell, and/or service a product that they knew or ought to have known was defective?
 - g) Were Class Members prejudiced by the Defendant's conduct, and, if so, what is the appropriate measure of these damages?
 - h) Is the Defendant liable to pay compensatory, moral, punitive and/or exemplary damages to Class Members, and, if so, in what amount?



IDENTIFY the conclusions sought by the class action to be instituted as being the following:

GRANT the class action of the Petitioner and each of the members of the class;

CONDEMN the Defendant to pay to each member of the class a sum to be determined in compensation of the damages suffered, and ORDER collective recovery of these sums;

CONDEMN the Defendant to pay to each of the members of the class, punitive damages, and ORDER collective recovery of these sums;

CONDEMN the Defendant to pay interest and additional indemnity on the above sums according to law from the date of service of the motion to authorize a class action;

ORDER the Defendant to deposit in the office of this court the totality of the sums which forms part of the collective recovery, with interest and costs;

ORDER that the claims of individual class members be the object of collective liquidation if the proof permits and alternately, by individual liquidation;

CONDEMN the Defendant to bear the costs of the present action including expert and notice fees;

RENDER any other order that this Honourable court shall determine and that is in the interest of the members of the class;

DECLARE that all members of the group that have not requested their exclusion, (...) be bound by any judgement to be rendered on the class action to be instituted in the manner provided for by the law;

FIX the delay of exclusion at thirty (30) days from the date of the publication of the notice to the members, date upon which the members of the class that have not exercised their means of exclusion will be bound by any judgement to be rendered herein;

ORDER the publication of a notice to the members of the class in accordance with article 1006 C.C.P. within sixty (60) days from the judgement to be rendered herein in LA PRESSE, THE GAZETTE, THE GLOBE AND MAIL, and the NATIONAL POST;

ORDER that said notice be available on the various Respondent's websites with a link stating "Notice to Nissan and Infiniti owners and lessees";



RENDER any other order that this Honourable court shall determine and that is in the interest of the members of the class;

THE WHOLE with costs including publications fees.

Montreal, February 20, 2012

(s) Jeff Orenstein

CONSUMER LAW GROUP INC.

Per: Me Jeff Orenstein

Attorneys for the Petitioner