

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N:

B. SAINT JOHN

Plaintiff

- and -

**BMW CANADA INC./BMW GROUP CANADA AND BMW OF NORTH AMERICA,
LLC**

Defendants

Proceeding under the *Class Proceedings Act, 1992*

STATEMENT OF CLAIM

TO THE DEFENDANTS

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the plaintiff. The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a statement of defence in Form 18A prescribed by the Rules of Civil Procedure, serve it on the plaintiff's lawyer or, where the plaintiff does not have a lawyer, serve it on the plaintiff, and file it, with proof of service, in this court office, **WITHIN TWENTY DAYS** after this statement of claim is served on you, if you are served in Ontario.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your statement of defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

Instead of serving and filing a statement of defence, you may serve and file a notice of intent to defend in Form 18B prescribed by the Rules of Civil Procedure. This will entitle you to ten more days within which to serve and file your statement of defence.

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

TAKE NOTICE: THIS ACTION WILL AUTOMATICALLY BE DISMISSED if it has not been set down for trial or terminated by any means within five years after the action was commenced unless otherwise ordered by the court.

Date: March 31, 2015

Issued by

(S) Signature

Local Registrar

Address of
court office:

161 Elgin Street
2nd Floor
Ottawa, ON K2P 2K1

TO: BMW Canada Inc./BMW Group Canada

50 Ultimate Drive
Richmond Hill, Ontario
L4S 0C8

Tel: (905) 770-2508
Fax: 1 (866) 217-1269

AND TO: BMW of North America, LLC

300 Chestnut Ridge Rd
Woodcliff Lake, New Jersey
07677-7731, USA

Tel: (201) 307-4000
Fax: (201) 307-4095

DEFINED TERMS

1. In this Statement of Claim, in addition to the terms that are defined elsewhere herein, the following terms have the following meanings:

- (a) “**Continuously Variable Automatic Transmission**” or “**CVT**” means the optional type of automatic transmission that **BMW** offers on its **Mini Coopers**;
- (b) “**Vehicles**”, “**Mini Coopers**” or “**First Generation MINIs**” means the model year 2002 through 2006 BMW Mini Cooper Hardtop (R50) and/or the model year 2005 through 2008 Mini Cooper Convertible (R52) – which are equipped with a **CVT** and were designed, manufactured, imported/exported, distributed, supplied, inspected, marketed, promoted, advertised, maintained, leased and/or sold and warranted by the **Defendants**;
- (c) “**Design Defect**” means the serious and pervasive design and manufacturing defects that render the **Vehicles** containing **CVT** unmerchantable and unsuitable for use and resulting in premature failure which could not reasonably be repaired;
- (d) “**Class**” or “**Class Members**” means all persons, entities or organizations resident in Canada who purchased and/or leased the **Vehicles** containing a **Continuously Variable Automatic Transmission**;
- (e) “*Class Proceedings Act*” means the *Class Proceedings Act*, SA 2003 c C-16.5, as amended;

- (f) “*Sale of Goods Act*” means the *Sale of Goods Act*, RSA 2000, c. S-2, as amended, including ss. 16;
- (g) “*Consumer Protection Act*” means the *Consumer Protection Act, 2002*, SO 2002, c. 30, Sched. A, as amended, including ss. 8, 11, 14 & 15;
- (h) “**Consumer Protection Legislation**” means:
- (i) *Business Practices and Consumer Protection Act*, SBC 2004, c.2, as amended, including ss. 4, 5 & 8-10;
 - (ii) *The Business Practices Act*, CCSM, c. B120, as amended, including ss. 2 & 23;
 - (iii) *Consumer Protection and Business Practices Act*, SNL 2009, c. C-31.1, as amended, including ss. 7, 8, 9 & 10, and *Trade Practices Act*, RSNL 1990, c. T-7, as amended, including ss. 5, 6 & 14;
 - (iv) *Fair Trading Act*, RSA 2000, c. F-2, as amended, including ss. 6, 7 & 13;
 - (v) *Consumer Protection Act*, RSQ c. P-40.1, as amended, including ss. 219 & 272;
 - (vi) *Consumer Product Warranty and Liability Act*, SNB 1978, c. C-18.1, including ss. 4, 10, 12, 15-18, 23 & 27;
 - (vii) *Consumer Protection Act*, RSNS 1989, c. 92, including ss. 26 & 28A;
 - (viii) *Business Practices Act*, RSPEI 1988, c. B-7, as amended, including ss. 2-4;
and
 - (ix) *The Consumer Protection Act*, SS 1996, c. C-30.1, as amended, including ss. 5-8, 14, 16, 48 & 65;

- (i) “**Competition Act**” means the *Competition Act*, RSC 1985, c. C-34, as amended, including ss. 36 & 52;
- (j) “**Motor Vehicle Safety Act**” means the *Motor Vehicle Safety Act*, SC 1993, c 16, as amended, including ss. 10 & 17;
- (k) “**Defendants**” or “**BMW**” means BMW Canada Inc./BMW Group Canada and BMW of North America, LLC;
- (l) “**Plaintiff**” means B. Saint John; and
- (m) “**Representation(s)**” means the **Defendants’** false, misleading or deceptive representations that their **Vehicles** (a) have performance characteristics, benefits and/or qualities which they do not have, (b) are of a particular standard or quality which they are not; and (c) their use of exaggeration, innuendo and ambiguity as to a material fact or failing to state a material fact regarding the **Design Defect** as such use or failure deceives or tends to deceive.

THE CLAIM

2. The proposed Representative Plaintiff, B. Saint John, claims on his own behalf and on behalf of the members of the Class as defined in paragraph 5 below (the “Class”) as against BMW Canada Inc./BMW Group Canada and BMW Of North America, LLC (the “Defendants”):
 - (a) An order pursuant to the *Class Proceedings Act* certifying this action as a class proceeding and appointing the Plaintiff as Representative Plaintiff for the Class Members;
 - (b) A declaration that the Defendants breached their express contractual warranty to properly repair Class Members’ Vehicles within the warranty period;
 - (c) A declaration that the Defendants breached their implied warranty of fitness for a particular purpose;
 - (d) A declaration that the Defendants breached their implied warranty of merchantability;
 - (e) A declaration that the Defendants breached their duty to warn the Plaintiff and Class Members of the dangerous and defective nature of the Vehicles;
 - (f) A declaration that the Defendants were negligent in the design, manufacture, import/export, distribution, supply, inspection, marketing, maintenance, lease and/or sale and warranty of the Vehicles;

- (g) A declaration that the Defendants made representations that were false, misleading, deceptive, and unconscionable, amounting to unfair practices in violation of the *Consumer Protection Act* and the parallel provisions of the Consumer Protection Legislation as well as the *Competition Act*;
- (h) A declaration that the present Statement of Claim is considered as notice given by the Plaintiff on his own behalf and on behalf of “persons similarly situated” and is sufficient to give notice to the Defendants on behalf of all Class Members;
- (i) In the alternative, a declaration, if necessary, that it is in the interests of justice to waive the notice requirement under Part III and s. 101 of the *Consumer Protection Act* and the parallel provisions of the Consumer Protection Legislation;
- (j) A declaration that the Defendants violated the *Motor Vehicle Safety Act* in failing to cause notice of the Design Defect to be disseminated;
- (k) General damages in an amount to be determined in the aggregate for the Class Members for, *inter alia*, pain, suffering, stress, trouble and inconvenience;
- (l) Special damages in an amount that this Honourable Court deems appropriate to compensate Class Members for, *inter alia*, the overpayment for the purchase price and/or lease payments of the Vehicles, the out-of-pocket expenses for repairs and replacements, including future costs of repair and including deductibles paid when repairs were covered by warranty, and the full cost of repair when they were not covered, the fair replacement value of the of the

defective parts and/or the costs of rectifying the defects, the costs associated with diagnosing the problem, out-of-pocket costs associated with towing, including future costs of towing, loss of use of the Vehicles and expenditures for rental vehicles, the diminished value of the Vehicles, and the cost of purchasing additional Vehicles and or/parts necessitated by the repeated problems with the CVT;

- (m) Punitive, aggravated, and exemplary damages in the aggregate in an amount to be determined as this Honourable Court deems appropriate;
- (n) A declaration that the Defendants are jointly and severally liable for any and all damages awarded;
- (o) An order that Class Members are entitled to a refund of the purchase price of their Vehicles, including, but not limited to sales taxes, license and registration fees based *inter alia* on revocation of acceptance and rescission or, in the alternative, the diminished value of the Vehicles;
- (p) In the alternative, an order for an accounting of revenues received by the Defendants resulting from the sale of the Vehicles;
- (q) A declaration that any funds received by the Defendants through the sale of the Vehicles are held in trust for the benefit of the Plaintiff and Class Members;

- (r) Restitution and/or a refund of all monies paid to or received by the Defendants from the sale of their Vehicles to members of the Class on the basis of unjust enrichment;
- (s) In addition, or in the alternative, restitution and/or a refund of all monies paid to or received by the Defendants from the sale of their Vehicles to members of the Class on the basis of *quantum meruit*;
- (t) An order compelling the creation of a plan of distribution pursuant to ss. 23, 24, 25 and 26 of the *Class Proceedings Act*;
- (u) A permanent injunction restraining the Defendants from continuing any actions taken in contravention of the Consumer Protection Legislation, the *Sale of Goods Act*, the *Consumer Protection Act* and the *Competition Act*;
- (v) Pre-judgment and post-judgment interest on the foregoing sums in the amount of 2% per month, compounded monthly, or alternatively, pursuant to ss. 128 and 129 of the *Courts of Justice Act*;
- (w) Costs of notice and administration of the plan of distribution of recovery in this action plus applicable taxes pursuant to s. 26 (9) of the *Class Proceedings Act*;
- (x) Costs of this action on a substantial indemnity basis including any and all applicable taxes payable thereon; and

- (y) Such further and other relief as counsel may advise and/or this Honourable Court may deem just and appropriate in the circumstances.

THE PARTIES

The Representative Plaintiff

3. The Plaintiff, B. Saint John, is an individual residing in the city of Vancouver, in the province of British Columbia.

4. In or about September 2012, the Plaintiff purchased a 2003 Mini Cooper Coupe R50 installed with CVT for \$7,900.00 plus taxes.

The Class

5. The Plaintiff seeks to represent the following class of which he is a member (the “Proposed Class”):

All persons, entities or organizations resident in Canada who purchased and/or leased a model year 2002 through 2006 BMW Mini Cooper Hardtop (R50) and/or a model year 2005 through 2008 Mini Cooper Convertible (R52) equipped with a Continuously Variable Automatic Transmission (CVT) [collectively the “Vehicles”].

The Defendants

6. The Defendant, BMW Canada Inc. / BMW Group Canada (hereinafter “BMW Canada”), is a Canadian corporation with its principal place of business in Richmond Hill, Ontario. It is responsible for the distribution of BMW luxury performance automobiles, sports activity vehicles, motorcycles, and the MINI brand.

7. The Defendant, BMW of North America, LLC (hereinafter “BMW NA”), is an American corporation with its principal place of business in Woodcliff Lake, New Jersey.

8. The Defendants design, manufacture, import/export, distribute, supply, inspect, market, promote, advertise, maintain, lease and/or sell and warrant the Vehicles and, in particular, the Continuously Variable Automatic Transmissions installed therein.

9. The maintenance services that BMW provides are through its nationwide network of authorized dealers and service providers¹.

10. The Defendants are resident in Ontario for the purpose of s. 2 of the *Consumer Protection Act*.

11. As set out hereinafter, the Defendants are jointly and severally liable for the acts and omissions of each other.

THE NATURE OF THE CLAIM

12. These class proceedings concern the numerous quality, design, manufacturing, and reliability defects with the Continuously Variable Automatic Transmissions installed in the Vehicles that render them unmerchantable, unsuitable, and unsafe for use.

13. The Defendants failed to disclose and/or actively concealed, despite longstanding knowledge, the reality that the CVT installed in the Vehicles is defective and predisposed

¹ In 2003, there were 32 independent BMW retail centres, 16 independent BMW motorcycle retailers, and 15 MINI retailers representing BMW across the country

prematurely suffer mechanical failure (hereinafter the “Design Defect”). BMW actively concealed the Design Defect and the fact that its existence would diminish both the intrinsic and resale value of the Vehicles. As a result, the high cost of repairs was transferred to Class Members, who were left completely unaware of the Design Defect until the CVT would inevitably fail outside the warranty period.

14. When the CVT fails, the affected Vehicles are no longer safe to operate and require repairs costing thousands of dollars. Due to the nature of the defect, consumers frequently have experienced, and will continue to experience, unexpected and premature transmission failure. This failure includes, but is not limited to, transmission slips, loss of forward propulsion, significant delays in acceleration, and total transmission failure.

15. These conditions present a serious safety hazard because the CVTs tend to fail suddenly and unexpectedly, at any time and under any driving condition or speed, thereby contributing to traffic accidents and to the risk of serious injury and/or death.

16. In addition, the Defendants touted CVT as providing more usable power, better fuel economy, and a smoother ride than a traditional automatic transmission. As a result of the Defendants’ unfair and deceptive practices, BMW has sold thousands of Vehicles that it would not have otherwise sold and/or sold them at an unfair premium.

17. The Plaintiff, on behalf of the Class Members, seeks an award of damages against BMW for its intentional, willful, and/or negligent failure to disclose and/or active concealment of the inherently defective and dangerous condition posed by the CVT and its failure to honour its warranty obligation to repair the Design Defect.

I. The BMW Mini Cooper

18. Pictured below are the Vehicles which are the subject of this Class proceeding – i.e. the Mini Cooper Hardtop R50 and the Mini Cooper Convertible R52.



19. In March of 2002, Mini Coopers were re-introduced after twenty (20) years in Canada and in the United States with great fanfare and public attention. BMW's marketing strategy for the Vehicles was to launch a new class of high performance, high-end vehicles. At the time of the launch, Jack Pitney, general manager of BMW's Mini division in the U.S., explained to the Wall Street Journal, "[w]e're creating a new segment" of premium small vehicles."

20. BMW developed and maintained a strong brand identity for the Vehicles by positioning them as "a high-performance automobile with macho tendencies and an irreverent, non-conformist, rugged outlaw kind of attitude" by initially targeting a young, male, urban demographic with a series of eye-catching, rambunctious online and OOH advertising campaigns² that have racked up awards including Cassies, OBIEs, Clios, Digital Marketing, and Cannes Lions.



² OOH advertising means out-of-home advertising which is advertising that reaches the consumer while they are outside of their home or on-the-go in public places (i.e. billboards, street furniture, transit, and alternative).

21. Consistent with the concept of creating a premium, yet small vehicle, BMW's advertisements for the Vehicles emphasized their superior design and performance features.

22. BMW's aggressive marketing tactics were extremely successful and consumers and automotive enthusiasts alike bought into the hype. J.D. Power and Associates awarded the Vehicles the most appealing compact car in its 2002 APEAL³ Study, based on a survey of owner's perceptions of the Vehicles' "design, layout, content and performance during the first 90 days of ownership." The Mini Cooper was also awarded the "2003 North American Car of the Year" which recognizes the most outstanding vehicle of the year based on factors including innovation, design, safety, handling, driver satisfaction, and value for the dollar.

23. In its "First Drive Review", Car and Driver Magazine said that although the Vehicles were priced in competition with the VW Golf, Ford Focus and Honda Civic, the car is "fun to drive and feels of high quality enough to wear the BMW badge."

24. In 2003, the Mini Cooper base price was approximately \$25,200 and, as such, competitors for the Mini Cooper CVT include the Acura RSX 2.0 (\$24,300), Ford Focus ZX3 (\$17,550), Honda SiR (\$25,500), VW Golf GTi 1.8T (\$26,330), Hyundai Tiburon SE (\$22,395), Pontiac Vibe (\$20,220), Subaru Impreza 2.5RS (\$26,995), and Toyota Matrix XR FWD (\$20,925).

25. According to an Autos.ca article:

It's obvious from a quick scan of the Cooper's competitors that most offer more horsepower, more interior room and more trunk space for less money or

³ APEAL Study means Automotive Performance, Execution and Layout Study.

comparable value. The Cooper is probably the best-looking and the best-handling car of the bunch, and has the most standard safety features, but it is certainly not the best value.

Cooper buyers will most likely be making an emotional choice – but then again, what sporty car buyer doesn't? Apparently, a low cost, high performance vehicle with good looks had been created – BMW was convincing people that a “premium small car segment” could exist.

26. Apparently, a low-cost, high-performance vehicle with good looks had been created. BMW was successfully convincing people that a premium small car market segment could exist.

27. As a result, would-be buyers lined up to get their hands on the Vehicles. BMW; however, under-budgeted production and could not keep up with the demand it had created. In 2002, the originally planned annual sales target of 100,000 units had been passed after just nine (9) months. As a result, buyers were forced to wait months to a year for delivery, and BMW was under tremendous pressure to increase production. By this time, the high demand was not surprising because, as Forbes.com reported, “there's just no competition for that kind of deal anywhere else on the planet.”

28. There's an old adage that if something sounds too good to be true, it probably is. After the dust settled from BMW's marketing fervor, owners of the Vehicles discovered that they had been duped when their Vehicles did not stand the test of time. It turns out that BMW was able offer such a fantastic deal because the Vehicles' beauty was only skin deep. In their haste to create a new “premium small car” market, BMW sacrificed quality in order to meet demand, to keep the sales price down, and to increase their profits. As a result, the Vehicles were quickly churned out with substandard parts and shoddy workmanship. BMW has refused to take

responsibility for these actions; preferring instead to leave its customers left to clean up the mess it had created.

29. In short, BMW failed to disclose the material problem and safety issues concerning the CVTs installed in the Vehicles.

30. A vehicle's automatic transmission is intended and reasonably expected to last for at least ten (10) years, if not more, without the need for repair or replacement. Nevertheless, BMW installed defective CVTs in the Vehicles, knowing that they were prone to premature failure.

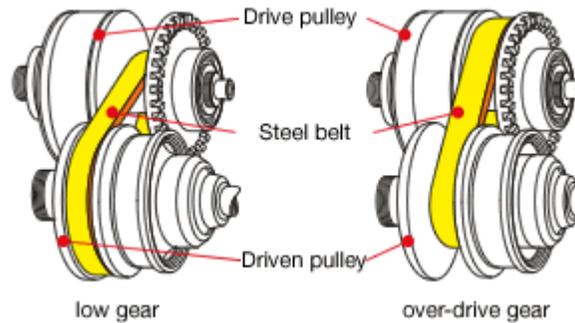
31. The CVT was first offered as an option in the Vehicles at the end of October 2002. The CVTs are prone to sudden premature failure, well before the end of the useful life of the Vehicle and well before consumers reasonably expect any such failure to occur. Reasonable alternative designs exist for automatic transmissions and BMW was aware of these reasonable design alternatives.

II. Continuously Variable Automatic Transmission (CVT)

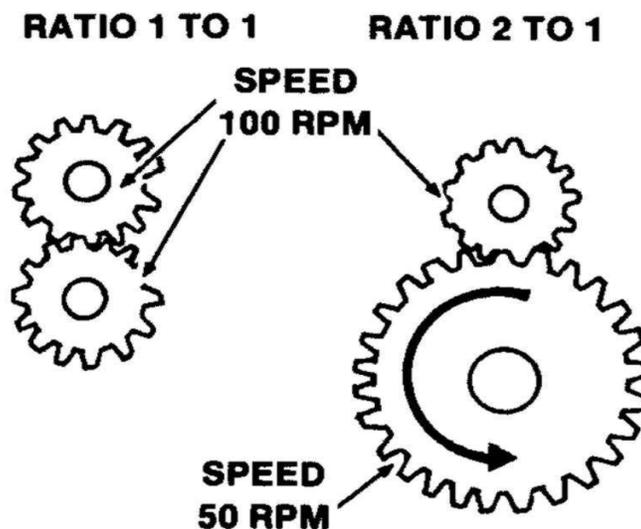
32. A continuously variable transmission⁴ is a transmission that can change seamlessly through an infinite number of effective gear ratios between maximum and minimum values. This contrasts with other mechanical transmissions that offer a fixed or static number of gear ratios.

⁴ A continuously variable transmission is also known as single-speed transmission, gearless transmission, one-speed automatic, variable pulley transmission, or in case of motorcycles, a twist-and-go.

33. In other words, the CVT is a type of automatic transmission that doesn't have any discernible shift points. The transmission uses a steel drive belt which connects two (2) bevelled pulleys. By enlarging or reducing the radius, the CVT can offer stepless transmission ratios – to the driver, it seems as though there is just one (1) gear.



34. When power is more important than economy, the gear ratio of the CVT can be changed to allow the engine to turn at the RPM⁵ at which it produces greatest power. This is typically higher than the RPM that achieves peak efficiency.



⁵ RPM or revolutions per minute is a measure of the frequency of rotation, specifically the number of rotations around a fixed axis in one minute. It is used as a measure of rotational speed of a mechanical component. In French, tr/mn (tours par minute) is the common abbreviation.

35. In 2003, the optional CVT offered on the Mini Cooper was priced at approximately \$5,100.00.

36. As a result of BMW's failure to disclose the fact that CVTs installed in the Vehicles were prone to unavoidable premature failure, consumers are required to spend many thousands of dollars (between \$6,000 and \$13,000) to repair or replace their CVTs, or sell their Vehicles without repair for a substantial loss. The fact that the CVTs installed in the Vehicles were prone to premature failure is material because no reasonable consumer expects that they will have to spend approximately one-third to one-half of the cost of a vehicle for repairs.

37. Additionally, the fact that CVTs installed in the Vehicles were prone to sudden premature failure is material to consumers because it presents a serious safety issue and places the driver and passengers at risk of harm, including injury and/or death. When CVTs fail, they do so without warning, resulting in a complete loss of power to the drive wheels. When CVTs fail while a vehicle is moving, occupants of the vehicle are exposed to rear-end collisions and other accidents caused by the driver's inability to maintain a situationally appropriate speed. Accordingly, the fact that the CVTs installed in the Vehicles were prone to premature failure also is material because there is no safe alternative way for Class Members to use their Vehicles to avoid the risk of serious harm.

38. BMW has been aware that the CVTs installed in the Vehicles were prone to premature failure, but yet, the company not only refused to even disclose the problem, BMW actively denied any knowledge of it; instead undertaking affirmative efforts to conceal the failures through, among other things, a series of Technical Service Bulletins issued to repair facilities. BMW concealed the fact that the CVTs installed in the Vehicles were prone to premature failure

effectively ensuring that the warranty period on the Vehicles will expire prior to Vehicle owners even becoming aware of the problem. Through this practice, BMW unlawfully transfers the cost of repairs and/or replacement from itself to the Class Members.

39. Hundreds of Vehicle owners have reported such complaints and BMW is well aware of the problem and the safety risks that it implicates. These complaints have been made to BMW directly, including through the company's network of dealerships, and to BMW's customer service agents. Additionally, the United States National Highway Transportation and Safety Administration (the "NHTSA") has documented over one hundred (100) complaints concerning this serious issue.

40. At present, BMW continues to refuse to offer any remedy or to publicly acknowledge the problem. Instead, BMW continues to take steps to actively conceal the Design Defect from consumers.

41. BMW knew that the CVTs installed in the Vehicles were plagued with problems from the beginning. Not long after CVT-equipped Vehicles were first offered for sale in October of 2002, BMW began receiving reports of premature CVT failures and, by the end of 2002, BMW was aware of such a significant amount of failures that the company's engineers had begun looking for a solution. Nevertheless, although BMW was well aware of significant numbers of CVT failures in late 2002, BMW kept it a secret and failed to disclose the problem, even as it continued to sell vehicles equipped with CVTs that were prone to dangerous, premature failures.

III. Technical Service Bulletins

42. Among other things, BMW's knowledge of the CVT problems since late 2002 is evidenced by a series of Technical Service Bulletins ("TSBs")⁶ issued by the company beginning only a few months after CVT-equipped Vehicles were first offered for sale in October of 2002.

43. In December 2002, BMW issued one of the first TSBs demonstrating the company's awareness of widespread premature CVT failures. In this TSB (number SI M24 01 02), BMW noted, "the CVT transmission may fail prematurely". Nevertheless, rather than disclose the problem and offer an adequate solution, BMW attempted to conceal it.

44. TSB number SI M24 01 02 shows that, in several ways, BMW attempted to conceal its knowledge of the significant number of premature CVT failures that began to amass only months after CVT-equipped Vehicles were introduced into the market. First, BMW mischaracterized the issue by claiming that "incorrect, low viscosity transmission oil was filled into the CVT transmission during production". Despite the Defendants' characterization, the transmission oil filled into CVT transmission from August 13, 2002 to October 23, 2002 was the correct oil at the time it was filled into the CVT and it was only identified as "incorrect" by BMW after the transmission oil specification was changed in response to BMW's awareness that CVTs were experiencing widespread premature failures. Second, when BMW issued TSB

⁶ BMW's TSBs are numbered according to the following protocol:

- SI M## ####, where "IS" stands for Service Information;
- "M" stands for MINI;
- The first two (2) numbers refer to the "group", or part of the vehicle that is the subject of the TSB, with the number "24" referring to the CVT;
- The second two (2) numbers provide a counter (e.g., 01, 02, 03) to count the TSBs issued for a specific group in a particular year; and
- Finally, the third two (2) numbers refer to the year the TSB was first issued.

number SI M24 01 02, it concealed its knowledge that the CVT failures were widespread by characterizing the problem as only applying to a limited segment of the production run. However, the production run at issue in TSB number SI M24 01 02 was not just any two (2) month production period, it was the first months of production of CVT-equipped Vehicles. Finally, rather than adequately address the problem with a permanent solution, TSB number SI M24 01 02 shows that BMW tried to conceal its knowledge of premature CVT failures by changing the transmission oil specification mid-production, hoping that by using different viscosity transmission oil, BMW would stem the rising tide of CVT failures, at least until customers' warranties expired and the cost of repairs could be shouldered by Class Members.

45. Furthermore, as a result of the high rate of premature CVT failures, in late 2002, in addition to changing the transmission oil specification, BMW's engineers were researching the CVT failures in an attempt to develop other ways to avoid repairing and replacing the CVT transmissions.

46. BMW's knowledge and concealment of the CVT failures is further documented by TSB number SI M24 01 03. As a result of BMW's engineering research concerning CVT failures that began in late 2002, BMW issued TSB number SI M24 01 03 in March of 2003. As BMW continued to ramp-up production and respond to increasing sales demand, it was already providing a dealer-wide message to address complaints concerning CVT failures. The subject line alone of TSB number SI M24 01 03, "MINI CVT Transmission Repair & Replacement Information", shows that BMW was aware of widespread premature CVT failures, requiring "repair & replacement", when it issued this TSB in March 2003.

47. As TSB number SI M24 01 03 shows, by March 2003, CVT failures had become so prevalent that BMW arranged for the assignment of a CVT “TECHNICAL SPECIALIST [who] must be contacted whenever a MINI CVT vehicle is brought into the service area, with a transmission related concern” (emphasis in original). In furtherance of its scheme to fraudulently conceal material information from the Plaintiff and from the members of the Class, TSB number SI M24 01 03 reveals that BMW was trying to control the flow of information concerning CVT failures and reduce its costs and culpability by denying CVT-related warranty claims. Among other things, BMW Group stated, “[a]ll CVT transmission replaced without a prior authorization from the Technical Hotline will result in the Warranty, Goodwill or Certified Pre-Owned claim being rejected!” (emphasis in original). Similarly, TSB number SI M24 01 03 stated, “[w]e encourage all MINI dealers to make use of ... ‘customer pay’ repairs” and “[t]he replacement of a complete CVT transmission without prior approval will be subject to debit” (emphasis in original). Despite BMW’s knowledge that CVTs were prone to premature failure, with some requiring replacement only approximately six (6) months after they were first sold, BMW actively concealed this material information from consumers as they continued to purchase and/or lease Vehicles equipped with CVTs.

48. Subsequently, in November 2004, BMW issued another TSB concerning CVT failures. A TSB is issued only after many months or more of engineering research. Accordingly, TSB number SI M24 01 04 reveals BMW’s continued awareness and active concealment concerning premature CVT failures dating back to well before it was issued.

49. Through TSB number SI M24 01 04, BMW stated that it was issuing special tools and repair instructions for an input shaft seal to avoid replacing CVT transmissions. Additionally, in

TSB number SI M24 01 04, BMW noted that “[r]eplacement of CVT transmissions are no longer necessary when the input shaft seal is leaking transmission fluid”. By stating the words “no longer necessary”, this TSB makes clear that BMW not only knew that CVTs were experiencing significant failures, it also knew that CVTs were routinely being replaced well before this TSB was issued. TSB number SI M24 01 04 reveals that as a result BMW’s awareness of these failures dating back to 2002 and 2003, BMW undertook efforts to develop and implement a comprehensive plan to design, manufacture, and distribute special tools to stem the tide of CVT transmissions that required replacement. The special tool sets to repair CVTs were issued through two (2) separate TSBs (nos. SI M04 06 04 and SI M04 04 04).

50. The TSBs issued by BMW in November 2004 apparently failed to resolve the CVT failures; approximately one and a half years later, BMW issued yet another TSB concerning the CVT (no. SI M04 01 06). Through TSB number SI M04 01 06, BMW distributed an additional set of tools designed to service the CVT input shaft bearings for the purpose of repairing a “howling noise from the transmission”.

51. Nevertheless, despite BMW’s ongoing efforts to conceal the issue, customer complaints and CVT failures persisted. Accordingly, BMW issued another TSB (no. SI M24 02 06) to give guidance to dealerships on how to respond to the problem. If a Vehicle was experiencing “a howling type of noise coming from the CVT transmission”, BMW expressly instructed its dealerships as follows: “[o]n a customer complaint basis only, replace the main CVT ball bearing together with the flange bolts, cover & oil pump 0-rings and the plate spring.” (See TSB no. SI M24 02 06.) Thus, not only did BMW fail to disclose the material information concerning CVT failures to consumers who bought Vehicles, the company intentionally

designed a plan to conceal the truth from the public, making it less likely that they would have their CVT replaced before the warranty expired.

52. In February 2006, BMW also issued an updated version of TSB number SI M24 01 03 that superseded the version originally issued in March 2003. Through the updates to this TSB, in an attempt to gather data about the premature CVT failures, BMW requested that service technicians submit data about the failures to BMW, telling them, “[i]nclude ‘CVT’ in the subject line” with details “sufficient to ensure that the person reading your case will be able to understand the situation and/or duplicate it if necessary”. The February 2006 updates to TSB number SI M24 01 03 also reveal that BMW continued to deny complete warranty coverage for CVT failures.

53. Despite the above chain of events, BMW did not inform members of the Class of its knowledge of the CVT failures, before they purchased and/or leased their Vehicles, nor during the time when the warranty was in place, which would have allowed them to timely obtain warranty repairs, and even when warranty coverage was expressly demanded, BMW continued to deny knowledge of the failures and refused to provide an adequate remedy.

IV. NHTSA Complaints

54. Notwithstanding the TSBs, BMW also is aware of the fact that CVTs installed in the Vehicles are prone to premature failure because of the numerous complaints concerning the issue that have been made to the NHTSA. Nevertheless, even in the face of these complaints, BMW continues to deny that there is a problem with the CVTs and refuses to disclose the truth to consumers.

V. Danger/Safety Concerns

55. In connection with its failure to disclose the fact that CVTs are prone to premature failure, BMW also risks the safety of the occupants of the Vehicles. When CVTs prematurely fail without warning while the vehicle is moving or in traffic, drivers lose the ability to accelerate or to maintain appropriate speed, thereby increasing the risk of a crash. The reasonable expectation that the Vehicles were safe was, and is, material to the Plaintiff and to the members of the Class.

56. Indeed, numerous Vehicles drivers have reported their safety concerns to the NHTSA.

VI. The Warranty

57. The Vehicles are covered by a standard four (4) year or 80,000 kilometre warranty, whichever occurs first. The extended warranty is available in either a two (2) or three (3) years extension and up to 200,000 kilometres, which occurs first.

58. With regard to the CVT, these warranties mean naught as the Defendants actively concealed the Design Defect from the public and from Class Members, which negated their utility to correct the problem before their expiry. Further, BMW has refused to take any action to correct this concealed Design Defect when it occurs in Vehicles outside of the applicable warranty period. Since the first signs of the Design Defect typically surfaces within the warranty period for the Vehicles, and continues unabated after the expiration of the warranty, given the Defendants' knowledge of this concealed Design Defect – any attempt by BMW to limit its warranty with respect to the Design Defect is unconscionable.

VII. Summative Remarks

59. The Plaintiff and the Class Members that he seeks to represent suffered economic damages by purchasing and/or leasing Defendants' products; they did not receive the benefit of the bargain, suffered out-of-pocket loss and are, therefore, entitled to damages.

60. The Plaintiff and members of the Class (as defined in paragraph 5 above) would not have purchased and/or leased the Vehicles or would not have paid the high price had they known that the CVTs installed in the Vehicles were prone to unavoidable, dangerous, and premature failure. When the Plaintiff and members of the Class purchased and/or leased the Vehicles, they relied on their reasonable expectation that they did not pose an unavoidable safety risk. Indeed, as mentioned, the safety of the Vehicles is all the more material given their small size. Furthermore, had BMW timely disclosed to consumers the material fact that CVTs installed in the Vehicles were prone to premature failure, Class Members would have required BMW to replace their CVTs before the expiration of the warranty period. BMW neither disclosed material facts to consumers at the time of purchase, nor anytime thereafter.

61. The Defendants placed their Vehicles into the stream of commerce in Canada with the intention and expectation that customers, such as the Plaintiff and Class Members, would purchase and/or lease the Vehicles based on their representations.

62. The Defendants knew or ought to have known that purchasers and/or lessees of Vehicles equipped with CVT would not be reasonably able to protect their interests, that such purchasers and/or lessees would be unable to receive a substantial benefit from the CVTs and that customers would be relying on the Defendants' representations to their detriment.

THE REPRESENTATIVE PLAINTIFF

63. In or about September 2012, the Plaintiff purchased a 2003 Mini Cooper Coupe R50 installed with CVT for \$7,900.00 plus taxes.

64. The Plaintiff was exposed to BMW's extensive promotional and advertising campaign, which influenced his purchasing decision.

65. At some time thereafter, the Plaintiff noticed a loud, whining noise while he would drive his Vehicle and in July of 2014, the Plaintiff brought the Vehicle for a check up to MINI YALETOWN at 790 Terminal Avenue, in Vancouver, British Columbia.

66. At MINI YALETOWN, the Plaintiff was informed that there was a Design Defect associated with the CVT and that he would need a new transmission at a cost of approximately \$8,000.00. The Plaintiff was charged approximately \$165.00 for the diagnosis of the Design Defect.

67. The Plaintiff was also informed that a class action had been filed in the United States based on the same issue. He was advised to search online to see if any similar class actions had yet been filed in Canada.

68. At present, the Plaintiff has not yet had the CVT replaced as the cost is significant and nontrivial.

69. At the time of sale, the Plaintiff was under the impression that he was purchasing a Vehicle that was free of any design defects; unbeknownst to him, he overpaid for the purchase

price as the Vehicle was in fact suffering from the Design Defect which also affects his Vehicle's resale value.

70. The Plaintiff was further deceived by the Defendants' misrepresentations; the Plaintiff did not receive the benefit of the bargain and/or suffered loss as a result of the Defendants' unfair practices and misrepresentations and was damaged.

71. The Plaintiff was unaware of the existence of the Design Defect until its manifestation.

72. The Plaintiff now has every reason to believe that the Vehicles are plagued by a serious and pervasive Design Defect, that the Defendants have been engaging in widespread misrepresentations with regard thereto and that several class actions were instituted and settled in the United States due to this same issue.

73. The internet is replete with references to the common and profound problems that customers have experienced with the Vehicles' CVT as a result of the Design Defect. The problem with the CVT is significant, dangerous, economically nontrivial and widespread.

74. The Plaintiff has suffered damages as a result of purchasing the Vehicle. In addition to the damages as outlined above he has also endured pain, suffering, damage and inconvenience.

CAUSES OF ACTION

A. Strict Liability

75. The Defendants are strictly liable to Class Members for the reasons that follow:
- (a) The Defendants designed, manufactured, imported/exported, distributed, supplied, inspected, marketed, maintained leased and/or sold and warranted the Vehicles, including the CVT;
 - (b) The Vehicles' CVTs suffer from serious manufacturing and design defects, are unsafe and unfit for their intended use;
 - (c) The CVTs could have been made without the Design Defect but-for the Defendants' business decisions;
 - (d) Class Members were entitled to expect that the Vehicles were not plagued by serious, dangerous and pervasive manufacturing and design defects;
 - (e) Class Members had no opportunity or expertise to inspect the CVTs in their Vehicles;
 - (f) The defects inherent in the design of the CVTs outweigh any possible benefits of their design and such defects were material contributing causes of the injuries and losses of Class Members; and

(g) At the time of the injury and loss to Class Members, the Vehicles were being used for the purpose and manner for which they were intended and Class Members were not aware of the Design Defect and could not, through the exercise of reasonable care and diligence, have discovered such defects.

B. Breach of Express Contractual Warranty

76. According to the terms of its warranty, the Defendants must, within the warranty period, or extended warranty period if applicable, properly repair the Vehicles.

77. BMW expressly warranted to Plaintiff and to Class Members that the CVTs were free from defects in material and workmanship and in the event that a defect manifested, the Defendants were obligated to correct the defect. This express representation becomes a basis of the bargain, implicating the Defendants' joint and several liability in the event of breach.

78. The Class Members did rely on the express warranties of the Defendants herein.

79. The Defendants knew or should have known that, in fact, said representations and warranties were false, misleading and untrue.

80. The Design Defect at issue in this Statement of Claim was present at the time of sale and/or lease to the Plaintiff and to the members of the Class.

81. Defendants breached their express warranties (and continue to breach these express warranties) because they did not (and do not) cover the expenses associated with replacing the defective CVTs in the Class Members' Vehicles with a non-defective CVT.

82. Pursuant to the express warranties, Defendants were obligated to pay for or reimburse the Class Members for costs incurred in replacing the defective CVTs.

83. Pursuant to the express warranties, Defendants were also obligated to repair the Design Defect.

84. Contrary to this warranty representation, the CVTs were defective in that when the CVT fails, the affected Vehicles are dangerous to operate and require repairs costing thousands of dollars. Due to the nature of the defect, Class Members frequently have experienced, and will continue to experience, unexpected and premature transmission failure. This failure includes, but is not limited to, transmission slips, loss of forward propulsion, significant delays in acceleration, and total transmission failure. This has resulted in damages, including diminished value of the Vehicles, and the various out-of-pocket expenses resulting from breakdowns.

85. Defendants knew, or should have known, that the CVTs installed in the Vehicles were defective and that their defects could not be corrected.

86. By virtue of repeated and frequent presentation of the Class Members' Vehicles at repair facilities as well as the plethora of complaints, Defendants were notified of the defects with the CVTs and knowingly failed to correct them.

87. By failing to provide a transmission that could function properly and on a reliable basis, the Defendants' behaviour has caused a failure of the essential purpose of the warranty to provide a CVT capable of functioning as required under all operating conditions for the reasonably expected life of the Vehicles.

88. As a direct and proximate result of the foregoing acts and/or omissions, the Class Members have suffered damages entitling them to compensatory damages, punitive damages and/or, in the alternative, equitable and declaratory relief as elaborated further below.

C. Breach of Implied Warranty of Fitness for a Particular Purpose

89. The members of the Class relied on the Defendants' representations which induced the Plaintiff and Class Members to purchase and/or lease the Vehicles containing the CVTs.

90. When purchasing their Vehicles, the Class Members, either expressly made it known or it was impliedly obvious from the character of the Vehicles, the particular purpose for which they required the Vehicles, namely for safe on-road transportation.

91. There are express or implied conditions that the Vehicles would be safe and durable for a reasonable period of time having regard to the uses to which the Vehicles would be put, uses that were clearly known to BMW.

92. The Defendants were notified of the defects of the CVTs, particularly so through the receipt of numerous warranty claims relating to the Design Defect, but have failed to correct them to date.

93. As a direct and proximate result of Defendants' breach of the implied warranty of fitness for particular purpose, the Class Members have suffered financial loss and other damages.

D. Breach of Implied Warranty of Merchantability

94. At all times relevant hereto, applicable law imposed a duty that requires that the CVTs be fit for the ordinary purposes for which they are used.

95. The CVTs were defective at the time they left the possession of BMW, as set forth above. BMW knew of this Design Defect at the time that these transactions occurred. Thus, the CVTs, when sold and installed and at all times thereafter, were not in merchantable condition or quality and are not fit for their ordinary intended purpose.

96. BMW had actual knowledge of, and received timely notice regarding the Design Defect at issue in this Statement of Claim and, notwithstanding such notice, failed and refused to offer an effective remedy.

97. In addition, BMW as well as the NHTSA has received thousands of complaints and other notices from customers advising of the Design Defect associated with the CVT.

98. The Defendants knew, or should have known, that their CVT was inferior to the other CVTs employed by other vehicle manufacturers, particularly so due to their knowledge of the Design Defect.

99. The CVT rendered the Vehicles unfit and inherently unsound for use, and the Defendants knew that they would not pass without objection in the trade; that they were not fit for the ordinary purpose for which they were used, that they would not operate on a reliable basis for the reasonable life of the CVT and were unmerchantable.

100. Consequently, the Defendants breached the implied warranty of merchantability, to wit: they failed to use safe and reliable CVTs that would operate for the anticipated life (nor the reasonable expectations) of the Vehicles.

101. Defendants were notified of the defects of the CVTs, but have failed to correct them. Defendants have received thousands of complaints and other notices from customers advising of the Design Defect associated with the CVT.

102. As a direct and proximate result of Defendants' breach of the implied warranty of merchantability, the Class Members have suffered financial loss and other damages.

E. Tort of Fraud by Concealment

103. The Defendants made material omissions as well as affirmative misrepresentations regarding the CVT and the Vehicles.

104. The Defendants knew that the representations were false at the time that they were made.

105. The Defendants concealed and/or suppressed material facts concerning the CVT and the Vehicles.

106. The Vehicles that were purchased and/or leased by Class Members were, in fact, defective and unreliable as the CVT was suffering from the Design Defect.

107. The Defendants had a duty to disclose that the Vehicles and the CVT installed therein were defective and unreliable particularly so due to their extensive marketing campaign focusing

on the CVT's increased usable power, better fuel economy, and a smoother ride than a traditional automatic transmission.

108. The Defendants had a duty to disclose these omitted material facts because they were known and/or accessible only to the Defendants who have superior knowledge and access to the facts and the Defendants knew they were not known to or reasonably discoverable by the Class Members. These omitted facts were material because they directly impact the value of the Vehicles. The Defendants possessed exclusive knowledge of the defects rendering the Vehicles unreliable, non-durable and rendering the operating costs higher than similar vehicles.

109. The Defendants actively concealed and/or suppressed these material facts, in whole or in part, with the intent to induce the Class Members to purchase and/or lease the Vehicles and the CVTs at a higher price, which did not match the Vehicles' true value.

110. The Class Members were unaware of these omitted material facts and would not have acted as they did if they had known of the concealed and/or suppressed facts. The Class Members' actions were reasonable and justified. The Defendants were in exclusive control of the material facts concerning the CVT defects and such facts were not known to the public or to the Class Members.

111. In addition, Class Members relied on the Defendants' Representation in relation to the CVT and Vehicles that they were purchasing and/or leasing and they purchased and/or leased such Vehicles. Said reliance was reasonable. The Class Members were without the ability to determine the truth on their own and could only rely on the Defendants' statements and representations.

112. As a result of the concealment and/or suppression of facts, the Class Members have sustained and will continue to sustain damages arising from the difference between the price that the Class paid and the actual value that they received.

113. As a result of their reliance, the Class Members have been injured in an amount to be proven at trial.

F. Tort of Civil Negligence

114. The Defendants had a positive legal duty to use reasonable care to perform their legal obligations to the Class Members, including, but not limited to designing, manufacturing, importing/exporting, distributing, supplying, inspecting, marketing, maintaining, leasing and/or selling and warranting safe and durable Vehicles, free from the Design Defect.

115. The Defendants breached their duty of care to the Class Members by negligently designing, manufacturing, importing/exporting, distributing, supplying, inspecting, marketing, maintaining, leasing and/or selling and warranting the Vehicles and by failing to ensure that they were of merchantable quality and fit for their intended purpose, free from the Design Defect. The aforesaid loss suffered by the Class Members was caused by this negligence, particulars of which include, but are not limited to, the following:

- a) The Defendants failed to properly design the CVT such that, under normal conditions, Class Members experienced serious problems including resulting in unexpected and premature transmission failure. This failure includes, but is not

limited to, transmission slips, loss of forward propulsion, significant delays in acceleration, and total transmission failure;

- b) The Defendants failed to properly manufacture and install the CVT such that, under normal conditions, Class Members experienced unexpected and premature transmission failure;
- c) The Defendants failed to properly market the CVT such that BMW failed to reveal the deficiencies with the CVT and the associated serious consequences;
- d) The Defendants failed to adequately test the CVT to ensure a proper design and to ensure proper and timely modifications to the CVT to eliminate the foreseeable risks;
- e) The Defendants failed to accurately, candidly, promptly and truthfully disclose the defective nature of the CVT;
- f) The Defendants failed to conform with good manufacturing and distribution practices;
- g) The Defendants failed to disclose to and/or to warn Class Members that the CVTs were defective when knowledge of the defects became known to them;
- h) The Defendants failed to recall and to carry out the proper repairs or to replace said defective CVTs;

- i) The Defendants continued to sell the CVT when they knew or ought to have known of the defective nature and other associated problems with said CVT;
- j) The Defendants consciously accepted the risk of the Design Defect;
- k) The Defendants failed to establish any adequate procedures to educate their distributors, dealerships or the ultimate users;
- l) The Defendants failed to identify, implement and verify that procedures were in place to address the CVT defects;
- m) The Defendants failed to change their design, manufacturing, inspection, marketing, maintenance, and testing process with respect to the CVT in a reasonable and timely manner;
- n) The Defendants failed to engage in adequate pre-market and production testing of the CVT; and
- o) The Defendants continue to fail to fulfill their ongoing obligations.

116. By virtue of the acts and omissions described above, the Defendants were negligent and caused damage and posed a real and substantial risk to the safety of the Class Members.

117. The loss, damages and injuries were foreseeable.

118. The Defendants' negligence proximately caused the loss, damage, injury and damages to the Class Members.

119. By reason of the foregoing, the Class Members are entitled to recover damages and other relief from Defendants.

G. Tort of Negligent Misrepresentation

120. The tort of negligent misrepresentation can be made out as:

- (a) There was a relationship of proximity in which failure to take reasonable care would foreseeably cause loss or harm to the Class;
- (b) The Defendants made a Representation that was untrue, inaccurate and/or misleading;
- (c) The Defendants acted negligently in making the Representation;
- (d) The Representation were relied upon by the Class reasonably; and
- (e) The Class has sustained damages as a result of their reliance.

121. The Defendants represented to the Class Members that the Vehicles had more usable power, better fuel economy, and a smoother ride than vehicles with a traditional automatic transmission – this Representation was untrue as set forth herein.

122. At the time that the Defendants made the misrepresentations herein alleged, they had no reasonable grounds for believing the Representation to be true, as there was ample evidence to the contrary set forth in detail above.

123. The Defendants made the Representation herein alleged with the intention of inducing the Class Members to purchase and/or lease their Vehicles.

124. The Class Members relied upon the Representation and, in reliance upon it, purchased and/or leased the Vehicles. Said reliance was reasonable.

125. The Class Members were without the ability to determine the truth of these statements on their own and could only rely on the Defendants.

126. Had the Class Members known the true facts, they would either not have purchased or leased the Vehicles or would not have paid such a high price.

127. By reason of the foregoing, the Class Members are entitled to recover damages and other relief from Defendants.

H. Breach of Implied Covenant of Good Faith and Fair Dealing

128. It is a well-established tenet of contract law that there is an implied covenant of good faith and fair dealing in every contract.

129. The Class Members entered into agreements to purchase and/or to lease Vehicles containing the CVT, and/or were in contractual privity with Defendants as a result of the express warranties described herein.

130. In addition, in bringing their Vehicles to the Defendants' dealerships for diagnosis and/or repair, the implied covenant of good faith and fair dealing equally applies.

131. The contracts and warranties were subject to the implied covenant that the Defendants would conduct business with the Plaintiff and the Class Members in good faith and would deal fairly with them.

132. The Defendants breached those implied covenants by selling and/or leasing to the Class Members Vehicles installed with CVT with the Design Defect, when they knew, or should have known, that the contracts and/or warranties were unconscionable and by abusing their discretion in the performance of the contract or by intentionally subjecting the Plaintiff and the Class Members to a risk beyond that which they would have contemplated at the time of purchase and/or lease as well as failing to provide for proper parts and service of the CVT they sold and installed.

133. The Defendants also breached the implied covenants by not placing terms in the contracts and/or warranties that conspicuously disclosed to the Plaintiff and the Class Members that the CVT was defective as described herein.

134. Lastly, the Defendants breached the implied covenants when they failed to disclose the Design Defect to Class Members when they brought their Vehicles in for repairs and/or diagnosis of the problem, particularly so when Class Members were charged for these as they are quite costly.

135. As a direct and proximate result of Defendants' breach of its implied covenants, the Plaintiff and the Class Members have been damaged in an amount to be determined at trial.

CAUSATION

136. The acts, omissions, wrongdoings, and breaches of legal duties and obligations of the Defendants are the direct and proximate cause of the Plaintiff's and Class Members' injuries.

137. The Plaintiff pleads that by virtue of the acts, omissions and breaches of legal obligations as described above, they are entitled to legal and/or equitable relief against the Defendants, including damages, consequential damages, specific performance, rescission, attorneys' fees, costs of suit and other relief as appropriate in the circumstances.

DAMAGES

A. Compensatory Damages (Economic Losses)

138. By reason of the acts, omissions and breaches of legal obligations of the Defendants, the Plaintiff and Class Members have suffered injury, economic loss and damages, the particulars of which include:

- (a) Overpayment for the purchase price and/or lease payments of the Vehicles,
- (b) Out-of-pocket expenses for repairs and replacements, including future costs of repair and including deductibles paid when repairs were covered by warranty, and the full cost of repair when they were not covered,
- (c) The fair replacement value of the of the defective parts and/or the costs of rectifying the defects;

- (d) The costs associated with diagnosing the problem;
- (e) Out-of-pocket costs associated with towing, including future costs of towing,
- (f) The loss of use of the Vehicles and expenditures for rental vehicles;
- (g) The diminished value of their Vehicles,
- (h) The cost of purchasing additional Vehicles and or/parts necessitated by the repeated problems with the CVT;
- (i) Pain and suffering, stress, trouble and inconvenience; and
- (j) Other damages as described herein.

B. Punitive, Exemplary and Aggravated Damages

139. The Defendants have taken a cavalier and arbitrary attitude to its legal and moral duties to the Class Members.

140. In addition, it should be noted since the Defendants are part of a highly-revered, multi-billion dollar corporation, it is imperative to avoid any perception of evading the law without impunity. Should the Defendants only be required to disgorge monies which should not have been retained and/or withheld, such a finding would be tantamount to an encouragement to other businesses to deceive their customers as well. Punitive, aggravated and exemplary damages are necessary in the case at hand to be material in order to have a deterrent effect on other corporations.

141. At all material times, the conduct of the Defendants as set forth was malicious, deliberate and oppressive towards their customers and the Defendants conducted themselves in a wilful, wanton and reckless manner.

STATUTORY REMEDIES

142. The Defendants are in breach of the *Sale of Goods Act*, the *Consumer Protection Act*⁷, the *Competition Act*, the *Motor Vehicle Safety Act* and/or other similar/equivalent legislation.

143. The Plaintiff pleads and relies upon trade legislation and common law, as it exists in this jurisdiction and upon consumer protection legislation and the equivalent/similar legislation and common law in the other Canadian provinces and territories. The Class Members have suffered injury, economic loss and damages caused by or materially-contributed to by the Defendants' inappropriate and unfair business practices, which includes the Defendants being in breach of applicable Consumer Protection laws.

A. Breach of the *Sale of Goods Act*

144. At all times relevant to this Claim, the Class Members were "buyer[s]" within the meaning of that term as defined in s.1 of the *Sale of Goods Act*.

⁷ While the *Consumer Protection Act* applies only in Ontario, other Canadian provinces have similar consumer protection legislation including, but not limited to: the *Consumer Protection Act*, CQLR c P-40.1 at ss. 41, 215, 216, 218, 219, 220(a), 221(g), 228, 239, 253, 270 & 272; the *Fair Trading Act*, RSA 2000, c F-2 at ss. 5-7, 7.2, 7.3, 9 & 13; the *Business Practices and Consumer Protection Act*, SBC 2004, c 2 at ss. 4-9, 171 & 172; *The Business Practices Act*, CCSM, c B120 at ss. 2-9 & 23; the *Consumer Protection and Business Practices Act*, SNL 2009, c C-31.1 and the *Trade Practices Act*, RSNL 1990, c T-7 at ss. 5-7 & 14; the *Business Practices Act*, RSPEI 1988, c B-7 at ss. 2-4; the *Consumer Protection Act*, SS 1996, c C-30.1 at ss. 5-8, 14, 16 & 23-25; the *Consumer Product Warranty and Liability Act*, SNB 1978, c 18.1 at ss. 10-13, 15, 23 & 27; the *Consumer Protection Act*, RSNS 1989, c 92 at ss. 26-29.

145. At all times relevant to this action, the Defendants were “seller[s]” within the meaning of that term as defined in s.1 of the *Sale of Goods Act*.

146. There were implied conditions as to merchantable quality or fitness pursuant to s. 16 of the *Sale of Goods Act* as well as an implied condition as regards defects as the Design Defect could not have been revealed upon examination.

147. The Defendants were aware that the customers purchased and/or leased the Vehicles with CVT based on their representations and based on their marketing and advertising and there is therefore an implied warranty or condition that the goods will perform as presented.

148. The Defendants committed a fault or wrongful act by breaching the implied condition as to quality or fitness for a particular purpose. By placing into the stream of commerce a product that was unfit for the purpose for which it was marketed and/or advertised, as per s. 16 of the *Sale of Goods Act*, the Defendants are liable. The Class is entitled to maintain an action for breach of warranty under ss. 52 & 53 of the *Sale of Goods Act*.

B. Breach of the *Consumer Protection Act*

149. At all times relevant to this action, many of the Class Members were “consumer[s]” within the meaning of that term as defined in s. 1 of the *Consumer Protection Act*.

150. At all times relevant to this action, the Defendants were “supplier[s]” within the meaning of that term as defined in s. 1 of the *Consumer Protection Act*.

151. The transactions by which many of the Class Members purchased or leased the Vehicles containing Defendants' defective CVT were "consumer transaction[s]" within the meaning of that term as defined in s. 1 of the *Consumer Protection Act*.

152. The Defendants have engaged in an unfair practice by making a Representation to Class Members which was and is "false, misleading or deceptive" and/or "unconscionable" within the meaning of ss. 14, 15 and 17 of the *Consumer Protection Act* as follows:

- (a) Representing that the CVT has performance characteristics, benefits and/or qualities, which they do not have;
- (b) Representing that the CVT are of a particular standard or quality which they are not; and
- (c) Using exaggeration, innuendo and ambiguity as to a material fact or failing to state a material fact regarding the Design Defect as such use or failure deceives or tends to deceive.

153. The Representation was and is unconscionable because *inter alia* the Defendants know or ought to know that consumers are likely to rely, to their detriment, on Defendants' misleading statements as to reliability and durability of the CVT.

154. The Representation was and is false, misleading, deceptive and/or unconscionable such that it constituted an unfair practice which induced the Class to purchase and/or lease the Vehicles containing CVT as a result of which they are entitled to damages pursuant to the *Consumer Protection Act*.

155. The Class Members relied on the Representation.

156. The reliance upon the Representation by the Class Members is established by his or her purchase and/or lease of the Vehicles. Had the Class Members known that the Representation was false and misleading they would either not have purchased and/or leased the Vehicles or would not have paid such a high price.

C. Breach of the *Competition Act*

157. At all times relevant to this action, the Defendants' design, manufacturing, importing/exporting, distribution, supply, inspecting, marketing, maintaining, leasing and/or selling and warranting business was a "business" and the CVT was a "product" within the meaning of that term as defined in s.2 of the *Competition Act*.

158. The Defendants' acts are in breach of s. 52 of Part VI of the *Competition Act*, were and are unlawful and render the Defendants jointly and severally liable to pay damages and costs of investigation pursuant to s. 36 of the *Competition Act*.

159. The Defendants made the Representation to the public and in so doing breached s.52 of the *Competition Act* because the Representation:

(a) Was made for the purpose of promoting, directly or indirectly, the use of a product or for the purpose of promoting, directly or indirectly, the business interests of the Defendants;

(b) Was made knowingly or recklessly;

(c) Was made to the public;

(d) Was false and misleading in a material respect; and

(e) Stated a level of CVT performance and quality that was false and not based on adequate and proper testing.

160. The Class Members relied upon the Representation by buying and/or leasing the Vehicles containing CVT and suffered damages and loss.

161. Pursuant to s. 36 of the *Competition Act*, the Defendants are liable to pay the damages which resulted from the breach of s. 52.

162. Pursuant to s. 36 of the *Competition Act*, the Class Members are entitled to recover their full costs of investigation and substantial indemnity costs paid in accordance with the *Competition Act*.

163. The Class Members are also entitled to recover as damages or costs, in accordance with the *Competition Act*, the costs of administering the plan to distribute the recovery in this action and the costs to determine the damages of each Class Member.

D. Breach of the *Motor Vehicle Safety Act*

164. At all times relevant to this action, the Defendants were a “company” within the meaning of that term as defined in s. 2 of the *Motor Vehicle Safety Act*.

165. At all times relevant to this action the Vehicles were “vehicle[s]” within the meaning of that term as defined in s.2 of the *Motor Vehicle Safety Act*.

166. In manufacturing, selling and/or importing the Vehicles, the Defendants breached the *Motor Vehicle Safety Act* as, although they were and are aware of the dangerous Design Defect, they continue to deny its existence and have not caused notice to be given to the Minister or to the Class Members.

167. Pursuant to s. 17 of the *Motor Vehicle Safety Act*, the Defendants are liable to pay damages as a result of their contravention of s. 10.

WAIVER OF TORT, UNJUST ENRICHMENT AND CONSTRUCTIVE TRUST

168. The Plaintiff pleads and relies on the doctrine of waiver of tort and states that the Defendants’ conduct, including the alleged breaches of any of the *Sale of Goods Act*, the *Consumer Protection Act*, the *Competition Act*, or the *Motor Vehicle Safety Act* constitutes wrongful conduct which can be waived in favour of an election to receive restitutionary or other equitable remedies.

169. The Plaintiff reserves the right to elect at the Trial of the Common Issues to waive the legal wrong and to have damages assessed in an amount equal to the gross revenues earned by the Defendants or the net income received by the Defendants or a percent of the sale of the Vehicles as a result of the Defendants’ unfair practices and false representations which resulted in revenues and profit for the Defendants.

170. Further, the Defendants have been unjustly enriched as a result of the revenues generated from the sale of the Vehicles and as such, *inter alia*, that:

- (a) The Defendants have obtained an enrichment through:
 - i. Revenues and profits from the sale of the Vehicles;
 - ii. The saving of costs of recalling the Vehicles;
 - iii. The saving of costs of replacing the CVT with a properly designed and manufactured CVT; and
 - iv. The saving of costs of repair by recommending repairs that simply covered up the root cause defects in the CVT to postpone recurrence of the malfunctions until the warranty expired.
- (b) The Plaintiff and other Class Members have suffered a corresponding deprivation; and
- (c) The benefit obtained by the Defendants and the corresponding detriment experienced by the Plaintiff and Class Members has occurred without juristic reason. Since the monies that were received by the Defendants resulted from the Defendants' wrongful acts, there is and can be no juridical reason justifying the Defendants' retaining any portion of such money paid.

171. Further, or in the alternative, the Defendants are constituted as constructive trustees in favour of the Class Members for all of the monies received because, among other reasons:

- (a) The Defendants were unjustly enriched by receipt of the monies paid for the Vehicles;
- (b) The Class Members suffered a corresponding deprivation by purchasing and/or leasing the Vehicles;
- (c) The monies were acquired in such circumstances that the Defendants may not in good conscience retain them;
- (d) Equity, justice and good conscience require the imposition of a constructive trust;
- (e) The integrity of the market would be undermined if the court did not impose a constructive trust; and
- (f) There are no factors that would render the imposition of a constructive trust unjust.

172. Further, or in the alternative, the Plaintiff claim an accounting and disgorgement of the benefits which accrued to the Defendants.

COMMON ISSUES

173. Common questions of law and fact exist for the Class Members and predominate over any questions affecting individual members of the Class. The common questions of law and fact include:

- (a) Are the Vehicles containing CVT defective, non-merchantable, and/or subject to premature mechanical failure in the course of their normal use?
- (b) Did the Defendants negligently perform their duties to properly design, manufacture, import/export, distribute, supply, inspect, market, maintain, lease and/or sell and warrant the Vehicles?
- (c) Are the Defendants strictly liable for the damages suffered by Class Members?
- (d) Did the Defendants breach their express and/or implied warranty by not providing proper repairs and/or replacement of the CVT during the warranty period?
- (e) Did the Defendants impliedly warrant the Vehicles for fitness for a particular purpose?
- (f) Did the Defendants impliedly warrant the Vehicles for merchantability?
- (g) Did the Defendants commit the tort of fraud by concealment when they concealed and/or suppressed material facts concerning the reliability, durability, total ownership costs and dealer support of the Vehicles?
- (h) Did the Defendants misrepresent or fail to adequately disclose to customers the true defective nature of the Vehicles?
- (i) Do the Defendants owe the Class members as duty to use reasonable care?

- (j) Did the Defendants act negligently in failing to use reasonable care to perform its legal obligations?
- (k) Did the Defendants intend or foresee that the Plaintiff or other Class Members would purchase the Vehicles containing the CVT based on their representations?
- (l) Did the Defendants' negligence proximately cause loss or injury and damages?
- (m) Did the Defendants breach their implied covenant of good faith and fair dealing?
- (n) Did the Defendants engage in unfair, false, misleading, and/or deceptive acts or practices in their design, manufacture, import/export, distribute, supply, inspect, market, maintain, lease and/or sale and warranty of the Vehicles?
- (o) Are the Defendants responsible for all related costs (including, but not limited to, diminished value of the Vehicles in terms of an overpayment for the purchase price and/or lease payments, the out-of-pocket expenses for repairs and replacements for the Vehicles, including future costs of repair and including deductibles paid when repairs were covered by warranty, and the full cost of repair when they were not covered, the fair replacement value of the of the defective parts and/or the costs of rectifying the defects, the costs associated with diagnosing the problem, towing costs for the Vehicles, including the cost of future towing, the loss of use of the Vehicles and expenditures for rental vehicles, the diminished value of the Vehicles, the cost of purchasing additional Vehicles and or/parts necessitated by the repeated problems with the CVT, and pain and

suffering, stress, trouble and inconvenience) to Class Members as a result of the problems associated with the Vehicles?

(p) Did the Defendants' acts or practices breach the *Sale of Goods Act*, the *Consumer Protection Act*, *Competition Act*, the *Motor Vehicle Safety Act* and/or other similar/equivalent legislation?

(q) Were the Defendants unjustly enriched?

(r) Have Class Members been damaged by the Defendants' conduct and, if so, what is the proper measure of such damages?

(s) Should an injunctive remedy be ordered to prohibit the Defendants from continuing to perpetrate their unfair practices?

(t) Are the Defendants responsible to pay punitive, aggravated, and/or exemplary damages to Class Members and in what amount?

EFFICACY OF CLASS PROCEEDINGS

174. The members of the proposed Class potentially number in the thousands. Because of this, joinder into one action is impractical and unmanageable. Conversely, continuing with the Class Members' claim by way of a class proceeding is both practical and manageable.

175. Given the costs and risks inherent in an action before the courts, many people will hesitate to institute an individual action against the Defendants. 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 the Defendants would increase delay and expense to all parties and to the court system.

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

177. 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.

178. The Plaintiff has the capacity and interest to fairly and fully protect and represent the interests of the proposed Class and has given the mandate to his counsel to obtain all relevant information with respect to the present action and intends to keep informed of all developments. In addition, class counsel is qualified to prosecute complex class actions.

LEGISLATION

179. The Plaintiff pleads and relies on the *Class Proceedings Act*, the *Sale of Goods Act*, the *Consumer Protection Act*, the *Competition Act*, the *Motor Vehicle Safety Act*, and other Consumer Protection Legislation.

JURISDICTION AND FORUM

Real and Substantial Connection with Ontario

180. There is a real and substantial connection between the subject matter of this action and the province of Ontario because:

- (a) Defendant BMW Canada Inc. has its head office in Ontario;
 - (b) The Defendants engage in business with residents of Ontario;
 - (c) The Defendants derive substantial revenue from carrying on business in Ontario;
- and
- (d) The damages of Class Members were sustained in Ontario.

181. The Plaintiff proposes that this action be tried in the City of Ottawa, in the Province of Ontario as a proceeding under the *Class Proceedings Act*.

THE DEFENDANTS' JOINT AND SEVERAL LIABILITY

182. The Plaintiff pleads that by virtue of the acts and omissions described above, the Defendants are liable in damages to himself and to the Class Members and that each Defendant is responsible for the acts and omissions of the other Defendants for the following reasons:

- (a) Each was the agent of the other;
- (b) Each companies' business was operated so that it was inextricably interwoven with the business of the other as set out above;

- (c) Each company entered into a common advertising and business plan to design, manufacture, import/export, distribute, supply, inspect, market, maintain, lease and/or sell and warrant the Vehicles;
- (d) Each owed a duty of care to the other and to each Class Member by virtue of the common business plan to design, manufacture, import/export, distribute, supply, inspect, market, maintain, lease and/or sell and warrant the Vehicles; and
- (e) The Defendants intended that their businesses be run as one global business organization.

SERVICE OUTSIDE ONTARIO

183. The originating process herein may be served outside Ontario, without court order, pursuant to subparagraphs (a), (c), (g), (h) and (p) of Rule 17.02 of the *Rules of Civil Procedure*. Specifically, the originating process herein may be served without court order outside Ontario, in that the claim is:

- (a) In respect of personal property situated in Ontario (rule 17.02(a));
- (b) For the interpretation and enforcement of a contract or other instrument in respect of personal property in Ontario (rule 17.02 (c));
- (c) In respect of a tort committed in Ontario (rule 17.02(g));

- (d) In respect of damages sustained in Ontario arising from a tort or breach of contract wherever committed (rule 17.02(h));
- (e) The claim is authorized by statute, the *Sale of Goods Act*, the *Competition Act* and the *Consumer Protection Act* (rule 17.02(n)); and
- (f) Against a person carrying on business in Ontario (rule 17.02(p)).

Date: March 31, 2015

**CONSUMER LAW GROUP
PROFESSIONAL CORPORATION**

251 Laurier Ave. West
Suite 900
Ottawa, Ontario
K1P 5J6

Jeff Orenstein
LSUC# 59631G
jorenstein@clg.org

Andrea Grass
LSUC# 65051R
agrass@clg.org

Tel: (613) 627-4894
Fax: (613) 627-4893

Lawyers for the Plaintiff

B. SAINT JOHN
Plaintiff

BMW CANADA INC. et alii.
Defendants

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED IN OTTAWA
Proceeding under the *Class Proceedings Act, 1992*

STATEMENT OF CLAIM

CONSUMER LAW GROUP
PROFESSIONAL CORPORATION
251 Laurier Ave. West, Suite 900
Ottawa, Ontario, K1P 5J6

Jeff Orenstein
LSUC# 59631G
jorenstein@clg.org

Andrea Grass
LSUC# 65051R
agrass@clg.org

Tel: (613) 627-4894
Fax: (613) 627-4893

Lawyers for the Plaintiff