

SUPERIOR COURT
(Class Action Chamber)

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

N° : 500-06-000796-165

DATE : April 6, 2021

PRESIDING: THE HONOURABLE GARY D.D. MORRISON, J.S.C.

ALBERT HADIDA
Representative Plaintiff

v.

NISSAN CANADA INC.
and
NISSAN NORTH AMERICA INC.
and
NISSAN MOTOR CO. LTD.
Defendants

JUDGMENT
(Application to Approve a Class Action Settlement and Class Counsel's Fees)

1- OVERVIEW

[1] Representative Plaintiff Albert Hadida and class counsel Mtre. Joey Zukran seek the approval of the Settlement Agreement¹ entered into between the parties on February 17, 2021.

¹ Exhibit S-1.

[2] The application is not contested, no class member having filed an objection and Defendants having voiced none.

[3] The present class action was authorized by the undersigned on January 24, 2019. By the same judgment, the status of representative plaintiff was ascribed to Albert Hadida. The application had been contested by Defendants (“Nissan”).

[4] Thereafter, the parties negotiated and concluded an agreement.

[5] On February 23, 2021, the undersigned authorized the pre-approval notices² informing the class members of the settlement approval hearing and, as well, appointed the Claims Administrator.

2- RESUME OF THE SETTLEMENT

[6] The claim relates to alleged defects in front spring coils installed on 2007-2012 Nissan Versas and, as well, to allegedly unreasonable delays by Nissan in replacing those coils springs.

[7] The parties agree that Nissan did repair the front coil springs or reimbursed those who had paid for such repairs. Accordingly, the settlement primarily envisages, from Plaintiff’s perspective, compensation for delays in carrying out or reimbursing repairs.

[8] Although supportive of the settlement, Nissan denies any wrongdoing or liability.

[9] The Settlement Agreement provides that Nissan will make available a “*Total Settlement Maximum*” of \$1,800,000, from which will be paid class counsel fees and disbursements, administration expenses and all compensation to class members should they all make claims.

[10] The class members will be entitled to choose between receiving a cash payment up to a maximum of \$70, payable either as an e-transfer or by cheque, or a consumer credit payment up to a maximum of \$115 in the form of a giftcard letter to be used in any Nissan dealership in Quebec for a period of five (5) years from the date of issuance.

[11] The Court appointed Paiements Velvet Payments Inc. as the Claims Administrator. It will be paid on a claims-made basis. It estimates³ its fees, including taxes, to be \$162,157.87, although the parties have since agreed to add claim forms to mailings, which they envisage may result in an increased cost of approximately \$18,000. The final amount of fees can be reviewed by the Court at the time of its closing judgment.

² Exhibits S-2 and S-3.

³ Exhibit S-13.

3- **CRITERIA APPLICABLE TO SETTLEMENT APPROVALS**

[12] As regards the applicable criteria for determining whether the Court should approve a settlement, Justice André Prévost identified them as follows in the oft-cited case of *Pellemans c. Lacroix*⁴.

- *les probabilités de succès du recours;*
- *l'importance et la nature de la preuve administrée;*
- *les termes et les conditions de la transaction;*
- *la recommandation des procureurs et leur expérience;*
- *le coût des dépenses futures et la durée probable du litige;*
- *la recommandation d'une tierce personne neutre, le cas échéant;*
- *le nombre et la nature des objections à la transaction;*
- *la bonne foi des parties;*
- *l'absence de collusion.*

[13] In the Court's view, taking these criteria into consideration, the proposed Settlement Agreement provides class members with a fair and just compensation.

[14] It should be noted that no class member objected to the proposed settlement.

[15] That said, however, 221 class members have provided a written opt-out from the settlement⁵. That is quite a high number of opt-outs, as acknowledged by counsel.

[16] That said, the opt-outs equate to less than one percent of class members, given Nissan's projection that 27,787 vehicles may have been involved.⁶

[17] Moreover, and as pointed out by counsel, class action case law would seem to confirm that automobile class actions sometimes have higher opt-out numbers than other types of class actions.⁷

⁴ 2011 QCCS 1345, par. 20.

⁵ Exhibit S-5 – March 25, 2021 (updated).

⁶ Exhibit S-3, Affidavit, para. 6.

⁷ *Vitoratos v. Takata Corporation*, 2021 QCCS 231, para. 34; *Schachter v. Toyota Canada inc.*, 2014 QCCS 802, paras. 94 and 97; *Courtemanche v. Honda Motor Co. Ltd.*, 2014 QCCS 5478, para. 19 viii).

[18] In the Court's view, given the circumstances, including the content of the opt-outs, many of which give no reason for the opt-out, it would be inappropriate to treat them as equating to an objection to the settlement.

[19] In fact, as argued by counsel, the numbers may well demonstrate a successful contact rate with the pre-approval notices.

[20] As for the proposed claim process, it appears to be clear, easy and simple.

[21] Taking into consideration the nature of the claim, the contested authorization, the proof and all factors related to the applicable criteria, the Court is of the view that in the interest of the class members the settlement should be approved.

4- CLASS COUNSEL FEES AND DISBURSEMENTS

[22] Class counsel is seeking Court approval of its fees in the amount of \$540,000 and disbursements in the amount of \$5,000, plus applicable taxes for both.

[23] Representative Plaintiff supports this application. Nissan does not contest it.

[24] The mandate given to class counsel⁸ provides for the greater of thirty percent (30%) of the total value, as if all members have claimed, and a multiplier of 3.5 on actual billable hours.

[25] The amount sought represents thirty percent (30%) of the total settlement value, as envisaged in the mandate, or a multiplier of approximately 2.77.

[26] The criteria used by the court in assessing whether Class counsel's fees are "*fair and reasonable*"⁹ have been inspired by the *Code de déontologie des avocats* and include the following:

- i) Time and effort expended by the attorneys on the litigation;*
- ii) The importance of the class action;*
- iii) The degree of difficulty of the class action;*
- iv) Class counsel's experience and expertise in a specific field;*
- v) The risks and responsibilities assumed by class counsel;*
- vi) The result obtained;*
- vii) Fees not contested;*

⁸ Exhibit S-11.

⁹ *Pellemans, supra*, note 4, para. 50.

[27] The use of thirty percent comes within the range of what is considered acceptable in such cases, as does the actual multiplier of approximately 2.77.

[28] Moreover, class counsel is asking the Court to approve the payment of two-thirds now and the remainder after the claims period, which the Court considers appropriate. The Court will address payment of the remaining one third in the closing judgment.

[29] In the Court's view, applying the applicable criteria to the present case leads to the conclusion that the fees and expenses claimed are fair and reasonable, and this keeping in mind that highly experienced class-action counsel for both parties debated fully the authorization and then proceeded to negotiate a settlement that is favourable to the class members.

PAR CES MOTIFS, LE TRIBUNAL :	FOR THESE REASONS, THE COURT:
[30] ACCUEILLE la demande en approbation de l'Entente de Règlement et en approbation des honoraires des procureurs du groupe;	GRANTS the Application to Approve a Class Action Settlement and for Approval of Class Counsel's Fees;
[31] DÉCLARE que les définitions contenues dans l'Entente de Règlement s'appliquent et sont incorporées au présent jugement, et en conséquence en font partie intégrante, étant entendu que les définitions lient les parties à l'Entente de Règlement;	DECLARES that the definitions set forth in the Settlement Agreement apply to and are incorporated into this judgment, and as a consequence shall form an integral part thereof, being understood that the definitions are binding on the parties to the Settlement Agreement;
[32] APPROUVE l'Entente de Règlement (« Settlement Agreement ») conformément à l'article 590 du <i>Code de procédure civile du Québec</i> , et ORDONNE aux parties de s'y conformer;	APPROVES the Settlement Agreement as a transaction pursuant to article 590 of the <i>Code of Civil Procedure</i> , and ORDERS the parties to abide by it;
[33] DÉCLARE que l'Entente de Règlement (incluant son préambule et ses annexes) est juste, raisonnable et qu'elle est dans le meilleur intérêt des Membres du Groupe et qu'elle constitue une transaction en vertu de l'article 2631 du <i>Code civil du Québec</i> , qui lie toutes les parties et tous les Membres du Groupe tel qu'énoncé aux présentes, à l'exception de ceux et celles	DECLARES that the Settlement Agreement, (including its Preamble and its Schedules) is fair, reasonable and in the best interest of the Class Members and constitutes a transaction pursuant to article 2631 of the <i>Civil Code of Quebec</i> , which is binding upon all parties and all Class Members at set forth herein, except those who have opted out (Exhibit S-5, March 25, 2021 (updated));

qui ont choisi de s'exclure (Pièce S-5, March 25, 2021 (updated));	
[34] ORDONNE ET DÉCLARE que le présent jugement, incluant l'Entente de Règlement, lie chaque Membre du Groupe Visé par le Règlement, à l'exception de ceux et celles qui ont choisi de s'exclure (Pièce S-5, March 25, 2021 (updated));	ORDERS AND DECLARES that this judgment, including the Settlement Agreement, shall be binding on every Settlement Class Member, except those who have opted out (Exhibit S-5 March 25, 2021 (updated));
[35] APPROUVE l'estimation des frais d'administration tels que définis au paragraphe 1.1(b) et conformément au paragraphe 5.1 et à l'annexe D de l'Entente de Règlement, en conformité avec la pièce S-13, plus des frais additionnels d'environ 18 000 \$;	APPROVES the estimated Administration Expenses as defined at section 1.1(b) and pursuant to section 5.1 and Schedule D of the Settlement Agreement, as per Exhibit S-13, plus approximately \$18,000 in additional expenses;
[36] ORDONNE à l'administrateur des réclamations d'envoyer l'Avis d'ordonnance de la Cour (pièce S-6) par courriel à tous les membres du groupe pour qui Nissan détient une adresse courriel et par la poste à tous les membres du groupe pour qui Nissan détient une adresse postale, contenant un hyperlien vers le formulaire de réclamation en ligne (pièce S-7), et ce dans les dix (10) jours de la date effective du règlement, afin de les informer de l'approbation de l'entente de règlement et du délai pour compléter et soumettre le formulaire de réclamation en ligne, le Tribunal approuvant par la présente lesdits avis et formulaire de réclamation;	ORDERS the Claims Administrator to send the Notice of Court Order (Exhibit S-6) by email to each Class Member for whom Nissan has an email address on file and by regular mail to each Class Member for whom Nissan has a mailing address on file containing a hyperlink to the online Claim Form (Exhibit S-7), within ten (10) days of the Effective Date of the settlement, in order to inform them of the approval of the Settlement Agreement and the delay to complete and submit the online Claim Form, the Court hereby approving the said Notice and Claim Form;
[37] DÉCLARE que les Membres du Groupe qui souhaitent soumettre une réclamation doivent le faire de la manière prévue dans l'Avis d'ordonnance de la Cour (pièce S-6), au plus tard le 60 ^e jour à compter de la date de la première publication de l'Avis d'ordonnance de la Cour;	DECLARES that Class Members who wish to submit a claim must do so in the manner provided for in the Notice of Court Order (Exhibit S-6), on or before the 60 th day from the date that the Notice of Court Order is first published;
[38] APPROUVE le paiement aux Avocats du Groupe de leurs honoraires	APPROVES the payment to Class Counsel of its extrajudicial fees and disbursements

extrajudiciaires et débours tel que prévu aux paragraphes 11.1(a) de l'Entente de Règlement;	as provided for at section 11.1(a) of the Settlement Agreement;
[39] APPROUVE le paiement à LPC Avocat inc., à même la somme détenue en fidéicommiss par McCarthy Tétrault, d'un montant de 360 005,96 \$ plus taxes, soit les deux tiers de 540 000 \$, ainsi que le paiement de 5 000 \$ plus taxes en débours, conformément au paragraphe 11.1(a) de l'Entente de Règlement;	APPROVES the payment to LPC Avocat Inc., from the sum held in trust by McCarthy Tétrault, of an amount of \$360,005.96 plus taxes, being two thirds of \$540,000.00, as well as the payment of \$5,000 plus taxes in disbursements, in accordance with section 11.1(a) of the Settlement Agreement;
[40] ORDONNE qu'au même moment, McCarthy Tétrault transfère la totalité du solde impayé et détenu en fidéicommiss à LCM Avocats inc. qui devra, jusqu'à jugement ultérieur du tribunal, le détenir dans un compte en fidéicommiss distinct générant des intérêts;	ORDERS that at the same time, McCarthy Tétrault transfer the balance of the amount unpaid and held in trust, to LCM Avocats Inc. who must, until ulterior judgment of the Court, hold it in a distinct interest-bearing trust account;
[41] AUTORISE LPC Avocat inc. à réclamer du tribunal le montant alors détenu en fidéicommiss par LCM Avocats inc. à la fin de la période de réclamation;	AUTHORIZES LPC Avocat Inc. to apply to the Court for the amount then held in trust by LCM Avocats Inc. at the end of the Claims Period;
[42] ORDONNE aux parties de faire rapport de l'exécution du jugement suite à la réception du rapport final de l'administrateur des réclamations, lequel doit être soumis au Tribunal aux fins de son jugement de clôture;	ORDERS the Parties to render account of the execution of the judgment upon receipt of the final report from the Claims Administrator, to be presented to the Court for purposes of a closing judgment;
[43] ORDONNE à l'administrateur des réclamations d'effectuer les prélèvements sur chaque réclamation admissible des membres autre que les paiements en crédit et de verser au Fonds d'aide aux actions collectives le pourcentage applicable en vertu de l'article 1.3° du <i>Règlement sur le pourcentage prélevé par le Fonds d'aide aux actions collectives</i> , conformément à l'article 42 de la <i>Loi sur le Fonds d'aide aux actions collectives</i> ;	ORDERS the Claims Administrator to deduct from each Class Member's eligible claim, other than the Consumer Credit Payments, and to pay to the Class Action Assistance Fund the applicable percentage pursuant to section 1(3) of the <i>Regulation respecting the percentage withheld by the Fonds d'aide aux actions collectives</i> in accordance with section 42 of the <i>Act respecting the Fonds d'aide aux actions collectives</i> ;

<p>[44] DÉCLARE que le reliquat constitué des sommes non encaissées par chèque ou des virements électroniques annulés, le cas échéant, sera sujet au prélèvement prévu à l'article 1. 1° du <i>Règlement sur le pourcentage prélevé par le Fonds d'aide aux actions collectives</i>, conformément à l'article 42 de la <i>Loi sur le Fonds d'aide aux actions collectives</i>.</p>	<p>DECLARES that the balance of uncashed cheques or cancelled Interac e-transfers, if any, shall be subject to the levy provided for in section 1(1) of the <i>Regulation respecting the percentage withheld by the Fonds d'aide aux actions collectives</i>, pursuant to section 42 of the <i>Act respecting the Fonds d'aide aux actions collectives</i>.</p>
<p>[45] LE TOUT, sans frais de justice.</p>	<p>THE WHOLE, without legal costs.</p>

Gary D.D. Morrison, J.S.C.

Mtre. Joey Zukran
LPC Avocat Inc.
Attorney for the Representative Plaintiff

Mtre. Kristian Brabander
Mtre. Catherine Martin
McCarthy Tétrault
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Date of Hearing : March 25, 2021