

# SUPERIOR COURT

(Class action)

CANADA  
PROVINCE OF QUEBEC  
DISTRICT OF MONTREAL

No.: 500-06-001075-205

DATE: July 3, 2023

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

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**BARRY NASHEN**

Applicant

v.

**STATION MONT TREMBLANT SOCIÉTÉ EN COMMANDITE**

and

**ALTERRA MOUNTAIN COMPANY**

Defendants

and

**LPC AVOCAT INC.**

Representative Plaintiff's Attorney

and

**FONDS D'AIDE AUX ACTIONS COLLECTIVES**

Mis en cause

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## JUDGMENT

(On the Application to Approve a Class Action Settlement and Class Counsel Fees)

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[1] The Court is seized with an application to approve a class action settlement and approve class counsel fees.

[2] On March 23, 2022, the Court of Appeal<sup>1</sup> granted the status of Representative Plaintiff to Mr. Barry Nashen and authorized him to bring a class action for the benefit of the persons forming part of the following class (the "**Class**" and the "**Class Members**"):

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<sup>1</sup> *Nashen c. Station Mont-Tremblant*, 2022 QCCA 415.

<p>All consumers who purchased a 2019-2020 “Tonik” ski pass for Mont-Tremblant, including persons who also purchased the “Privilege Bundle” / “Tonik Forfait de privilèges” add-on.</p>	<p>Tous les consommateurs ayant acheté une passe de ski « Tonik » 2019-2020 pour le Mont-Tremblant y compris les personnes qui ont également acheté le forfait « Privilege bundle » / « Tonik Forfait de privilèges ».</p>
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[3] Mr. Nashen filed his Originating Application on April 4, 2022 (subsequently amended on July 7, 2022).

[4] On May 25, 2022, the parties informed the Court that they planned to participate in a CRA and asked the Court to suspend the case to allow settlement discussions to unfold. The Court agreed.

[5] The CRA was successful. The parties have finalized a settlement agreement (the “**Settlement**”)<sup>2</sup> which they now ask the Court to approve.

[6] On May 3, 2023, the Court: (i) approved the form and content of the notices informing the Class Members of the Settlement (the “**Pre-Approval Notices**”); (ii) fixed the date for Class Members to opt out or object to the Settlement on June 16, 2023; (iii) appointed KPMG as the Claims Administrator; and (iv) scheduled the Settlement approval hearing on June 20, 2023.<sup>3</sup>

[7] The Pre-Approval Notices were sent in conformity with the Court’s judgment.

## **ANALYSIS**

[8] A class action is a proceeding in which one person, the representative, sues on behalf of all members of a class who have a similar claim. Since the class representative is not specifically mandated to act on behalf of these members, prior authorization from the Court is required before a class action can be filed.<sup>4</sup>

[9] Once a class action is authorized, the Court continues to look out for the interests of absent class members.<sup>5</sup>

[10] The absence of a specific mandate for the representative and the court’s duty to look after the interests of the members justify the need for court approval of:

- (1) a settlement or discontinuance of the class action; and

<sup>2</sup> Exhibit R-1.

<sup>3</sup> *Nashen c. Station Mont Tremblant*, 2023 QCCS 1445.

<sup>4</sup> *L’Oratoire Saint-Joseph du Mont-Royal c. J.J.*, 2019 CSC 35, para. 6.

<sup>5</sup> *Option Consommateurs c. Banque Amex du Canada*, 2018 QCCA 305, paras. 61 and 84; Luc CHAMBERLAND, Jean-François ROBERGE, Sébastien ROCHETTE and al., *Le grand collectif: Code de procédure civile: commentaires et annotations*, 5<sup>th</sup> ed., volume 2, Montréal, Éditions Yvon Blais, 2020; Pierre-Claude LAFOND, *Le recours collectif, le rôle du juge et sa conception de la justice : impact et évolution*, Cowansville, Éditions Yvon Blais, 2006, pp. 44 to 53.

- (2) class counsel fees, even when there is a fee agreement in place between the representative and class counsel.

[11] In approving a settlement or class counsel fees, the Court must always keep in mind the social objectives of the class action procedure: to facilitate access to justice, to modify harmful conduct and to conserve judicial resources.<sup>6</sup>

## 1. Is the Proposed Settlement Agreement Fair, Equitable and in the Best Interests of Class Members?

### 1.1 Applicable Law

[12] Article 590 of the *Code of Civil Procedure* (“C.C.P.”) provides that class action settlement is subject to the approval of the court. This approval is granted only after notices have been sent to the members informing them of the nature of the class action, the general provisions of the proposed settlement and the settlement options available to them.<sup>7</sup>

[13] Although article 590 C.C.P. does not set out specific criteria, it is now well recognized that the role of the court in approving a settlement is to ensure that it is fair, equitable and in the best interests of the class members.<sup>8</sup> In doing so, the court must weigh the respective benefits and disadvantages of the settlement agreement for the class members.<sup>9</sup> It must also keep in mind the initial objectives of the proceeding and compare them against the actual benefits the class members obtain as a result of the settlement agreement.<sup>10</sup> Finally, the court must ensure that the integrity of the judicial process is maintained.<sup>11</sup>

[14] When assessing whether a settlement is in the best interest of the class, Quebec courts have adopted the following criteria:<sup>12</sup>

- (1) the likelihood of success of the action;
- (2) the importance and nature of the evidence adduced;

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<sup>6</sup> *L’Oratoire Saint-Joseph du Mont-Royal c. J.J.*, *supra*, note 4, para. 6; *Abihisira c. Stubhub inc.*, 2020 QCCS 2593, para. 24.

<sup>7</sup> Catherine PICHÉ, *Le règlement à l’amiable de l’action collective*, Cowansville, Éditions Yvon Blais, 2014, pp. 191 and 192.

<sup>8</sup> *Option Consommateurs c. Banque Amex du Canada*, *supra*, note 5, para. 84; *Allen c. Centre intégré universitaire de santé et de services sociaux de la Capitale-Nationale*, 2018 QCCS 5313, para. 55; *Jacques c. 189346 Canada inc. (Pétroles Therrien inc.)*, 2017 QCCS 4020, para. 8 (Application for approval of a second settlement agreement and attorneys’ fees granted, 2020 QCCS 3192); *Bouchard c. Abitibi-Consolidated Inc.*, J.E. 2004-1503 (C.S.), para. 16; L. CHAMBERLAND, J.-F. ROBERGE, S. ROCHETTE and al., *supra*, note 5.

<sup>9</sup> *Option Consommateurs c. Banque Amex du Canada*, *supra*, note 5, para. 84; *Conseil québécois sur le tabac et la santé c. JTI-MacDonald Corp.*, 2011 QCCS 4981, para. 49.

<sup>10</sup> *Arrouart c. Anacolor inc.*, 2019 QCCS 4795, para. 20.

<sup>11</sup> C. PICHÉ, *supra*, note 7, p. 164.

<sup>12</sup> Adopted from *Dabbs v. Sun Life Assurance Co. of Canada*, [1998] O.J. No. 1598 (Gen. Div.), para. 15.

- (3) the terms and conditions of the settlement;
- (4) the recommendation of counsel and their experience;
- (5) the cost of future expenses and the probable duration of the litigation;
- (6) the number and nature of objections to the settlement agreement; and
- (7) the good faith of the parties and the absence of collusion.

[15] As some judges have noted, the exercise is delicate given that once an agreement has been reached, the usual adversarial process gives way to the unanimity of the parties who signed the settlement agreement and who now have a vested interest in seeing it approved by the court.<sup>13</sup> Moreover, at the approval stage, the court generally has only limited knowledge of the circumstances and issues of the dispute.<sup>14</sup>

[16] Nonetheless, while the court must remain vigilant, in the absence of a violation of public policy,<sup>15</sup> the court must approve a settlement if it meets the criteria and is in the best interests of class members.<sup>16</sup>

[17] Courts must encourage negotiated settlements, as this is generally in the best interests of the parties and of the justice system. Early resolution of disputes promotes access to justice. It avoids lengthy and costly trials, which contributes to the saving of judicial resources. These benefits are consistent with the objective set out in the opening provision of the C.C.P., which states that “This Code is designed to provide, in the public interest, means to prevent and resolve disputes and avoid litigation through appropriate, efficient and fair-minded processes that encourage the persons involved to play an active role.”<sup>17</sup>

[18] This principle remains true for class actions.

[19] Moreover, reducing the time between the filing of a claim and the distribution of benefits has an impact on the rate of claims and the ability of members to prove their membership in the class.<sup>18</sup> For the same reason, a simple, quick and efficient claims process that minimizes administrative costs argues in favour of settlement approval.<sup>19</sup>

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<sup>13</sup> *Pellemans c. Lacroix*, 2011 QCCS 1345, para. 21, quoted with approval in *Allen c. Centre intégré universitaire de santé et de services sociaux de la Capitale-Nationale*, *supra*, note 8, para. 33.

<sup>14</sup> *Pellemans c. Lacroix*, *supra*, note 13, para. 21.

<sup>15</sup> *M.G. c. Association Selwyn House*, *supra*, note 13, para. 22.

<sup>16</sup> *Jacques c. 189346 Canada inc. (Pétroles Therrien inc.)*, *supra*, note 8, para. 11.

<sup>17</sup> L. CHAMBERLAND, J.-F. ROBERGE, S. ROCHETTE and al., *supra*, note 5.

<sup>18</sup> *Beauchamp c. Procureure générale du Québec*, 2019 QCCS 2421, para. 57.

<sup>19</sup> *Ibid*, paras. 33 and 40.

[20] The agreement does not have to be perfect. It should be remembered that a settlement negotiated to avoid the risks and costs of litigation necessarily involves some give and take. Moreover, since settlement discussions are protected by privilege, the reasons for these compromises are not always disclosed.<sup>20</sup>

[21] The court should not alter, in whole or in part, the settlement reached by the parties, although the court may suggest that the parties amend the settlement to correct certain deficiencies in order to facilitate approval.<sup>21</sup> The proposed release must be carefully drafted to ensure that it does not relieve the defendants of liability for conduct that does not fall within the claims set out in the complaint or for which the plaintiffs are not being compensated.<sup>22</sup>

## 1.2 Discussion

[22] The Pre-Approval Notices were sent in accordance with the pre-approval notice judgment.

[23] The Court must determine whether the Settlement is fair, reasonable and in the interest of the Class Members.

[24] The Court concludes that it is. The Settlement is approved.

### 1.2.1 The Likelihood of Success of the Class Action

[25] As in most cases ending with a settlement, both parties feel they had good arguments to present.

[26] Plaintiff is confident that its claim is well founded. Defendants deny his claims and allegations.

[27] The case was not without risks. The original motion to authorize was dismissed.<sup>23</sup> Although the Court of Appeal overturned the judgment, there remains a risk that the case would not have been successful on the merits or that damages would have been difficult to prove.

[28] The Settlement guarantees that each Class Member will receive a benefit.

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<sup>20</sup> *Option Consommateurs c. Banque Amex du Canada*, supra, note 5, para. 84; *Halfon c. Moose International Inc.*, 2017 QCCS 4300, para. 23; *Option Consommateurs c. Infineon Technologies, a.g.*, 2013 QCCS 1191, paras. 39 and 40.

<sup>21</sup> *Bouchard c. Abitibi Consolidated*, supra, note 8, para. 17; L. CHAMBERLAND, J.-F. ROBERGE, S. ROCHETTE and al., supra, note 5.

<sup>22</sup> *Leung c. Uber Canada inc.*, 2022 QCCS 1076, para. 57; *Walter c. Ligue de hockey junior majeur du Québec inc.*, 2020 QCCS 3724, paras. 41 to 47.

<sup>23</sup> *Nashen c. Station Mont-Tremblant*, 2021 QCCS 1450 (Appeal granted; file referred back to the Chief Justice of the Superior Court, 2022 QCCA 415).

### 1.2.2 The Importance and Nature of the Evidence Adduced

[29] Defendants provided information to the Plaintiff during the confidential mediation process.

[30] Plaintiff and his attorneys had access to and reviewed this information during the negotiation process.

### 1.2.3 The Terms and Conditions of the Settlement

[31] The Settlement provides for a payment equivalent to 12% of the price that Class Members paid for their 2019-2020 Tonik Pass.

[32] This result is relatively favourable for the 15,005 Class Members. For one, it provides immediate resolution of a litigation that would have lasted another few years.

[33] The 12% reduction also compares favourably to the 22.69% sought in the Originating Application (paras. 29, 41, 42 and conclusion no. 2).

[34] The claims process is simple and does not require Class Members to submit or provide any documentation. They will automatically receive the Interac e-transfers by email (section 3.3 of the Settlement).

### 1.2.4 The Recommendation of Counsel and their Experience

[35] The Settlement was reached between counsel who are experienced in class actions.

[36] It was reached with the assistance of an experienced mediator.

### 1.2.5 The Cost of Future Expenses and the Probable Duration of the Litigation

[37] Continuing the litigation would have required important resources and further discovery to assess the presence of a fault and damages.

[38] Experts would have been hired on both sides to opine on the fault and the quantification of damages.

[39] The case could have continued for years with the possibility of appeals.

### 1.2.6 The Number and Nature of Objections to the Transaction

[40] Emails were sent directly to the 15,005 Class Members on record advising that they had until June 16, 2023, to opt out or object to the Settlement.

[41] No one objected.

[42] Two Class Members opted out.

[43] The number of opt-outs is negligible in proportion to the total number of Class Members.

### 1.2.7 The Good Faith of the Parties and the Absence of Collusion

[44] There is no hint of collusion here. The Settlement was negotiated at arm's length. The negotiations that led to the Settlement were adversarial. The parties proceeded with mediation.

## 2. Are Class Counsel Fees Fair, Reasonable and in the Best Interests of Class Members?

### 2.1 **Applicable Law**

[45] Article 593 C.C.P. imposes a duty on the court to ensure that the fees of class counsel are in the interests of the class members, fair and reasonable, justified by the circumstances and commensurate with the services rendered. "If the fee is not reasonable, the court may determine it".<sup>24</sup>

[46] The existence of an agreement between the representative and his or her counsel remains relevant and it benefits from a presumption of validity. Nonetheless, the agreement is not binding on the court, who must ensure that the fees of class counsel remain reasonable.<sup>25</sup> Indeed, while it is true that the fee agreement signed by the representative is binding on the class members,<sup>26</sup> the class members did not consent to it and the court must exercise its supervisory role and act as a guardian of the interests of absent class members.<sup>27</sup>

[47] Thus, the court should not hesitate to review these fees in light of their real value, to arbitrate them and to reduce them if they are unnecessary, excessive, or out of proportion to what the class is receiving under the settlement.<sup>28</sup> In particular, the court must be concerned with preserving the integrity and credibility of class actions, both in the eyes of class members and in the eyes of public observers. In doing so, it must avoid decisions that would tend to lend credence to the profit motive and commercialism that some people albeit perhaps unfairly, attribute to class actions.<sup>29</sup> Class actions must not merely become

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<sup>24</sup> Art. 593 C.C.P.; *A.B. c. Clercs de Saint-Viateur du Canada*, 2023 QCCA 527, para. 50; *Option Consommateurs c. Banque Amex du Canada*, *supra*, note 5, para. 60.

<sup>25</sup> *A.B. c. Clercs de Saint-Viateur du Canada*, *supra*, note 24, para. 51; *Option Consommateurs c. Banque Amex du Canada*, *supra*, note 24, paras. 61 and 66; art. 32 of the *Act respecting the fonds d'aide aux actions collectives*, RLRQ, c. F-3.2.0.1.1.

<sup>26</sup> *Pellemans c. Lacroix*, *supra*, note 13, para. 48.

<sup>27</sup> *Option Consommateurs c. Banque Amex du Canada*, *supra*, note 24, para. 67; *Option Consommateurs c. Infineon Technologies, a.g.*, *supra*, note 20, para. 65.

<sup>28</sup> *A.B. c. Clercs de Saint-Viateur du Canada*, *supra*, note 24, para. 51; *Apple Canada Inc. c. St-Germain*, 2010 QCCA 1376, para. 36.

<sup>29</sup> *A.B. c. Clercs de Saint-Viateur du Canada*, *supra*, note 24, para. 55; *Option Consommateurs c. Infineon Technologies, a.g.*, *supra*, note 27, para. 68.

a source of enrichment for plaintiffs' lawyers or a source of funding for non-profit organizations.<sup>30</sup>

[48] The court must strike a balance that allows class counsel to obtain a sum sufficient to incite them to file the next action, while keeping in mind that the members must be the primary beneficiaries of the amounts paid by the defendants.<sup>31</sup>

[49] In assessing the fairness and proportionality of fees, the court may be guided by the criteria set out in section 102 of the *Rules of Professional Conduct for Advocates*.<sup>32</sup>

- (1) experience;
- (2) the time and effort required and expended on the matter;
- (3) the difficulty of the matter;
- (4) The importance of the matter to the client;
- (5) The responsibility assumed;
- (6) The provision of professional services that are unusual or require special skill or exceptional promptness;
- (7) the result achieved;
- (8) fees provided for by law or regulation; and
- (9) disbursements, fees, commissions, rebates, expenses or other benefits that are or will be paid by a third party in connection with the client's mandate.

[50] The judge must also consider the risk faced by class counsel. This risk should be assessed at the time counsel accepted the retainer rather than at the time of the fee approval application.<sup>33</sup> Once a settlement has been concluded, courts should be wary to decide, with the benefit of the 20/20 vision provided by hindsight, that a settlement was easily within reach.

[51] Finally, in a class action context, given the role of the court to act as a guardian of the interests of class members, the views of those members must also be considered.

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<sup>30</sup> *Option Consommateurs c. Banque Amex du Canada*, 2017 QCCS 200, para. 110 (confirmed by the Court of Appeal, 2018 QCCA 305).

<sup>31</sup> *A.B. c. Clercs de Saint-Viateur du Canada*, *supra*, note 24, para. 51 quoting Catherine PICHÉ, *L'action collective : ses succès et ses défis*, Montréal, Les Éditions Thémis, 2019, p. 227.

<sup>32</sup> *Code of Professional Conduct of Lawyers*, RLRQ, c. B-1, r. 3.1, art. 101 and 102.

<sup>33</sup> *A.B. c. Clercs de Saint-Viateur du Canada*, *supra*, note 24, para. 54; *Skarstedt c. Corporation Nortel Networks*, 2011 QCCA 767, para. 16; *Pellemans c. Lacroix*, *supra*, note 26, para. 52.



### 2.1.1 Contingency Agreement Percentage and Use of Multipliers

[52] While there are some exceptions, contingency fee agreements are generally valid in Quebec.<sup>34</sup> In class actions, they are not only valid, but common and should be encouraged.<sup>35</sup>

[53] Such agreements promote access to justice since members would rarely agree to pay the hundreds of thousands of dollars in fees, disbursements and expert fees required to bring such actions to fruition. Achieving the social goals of class action proceedings (facilitating access to justice, changing harmful behaviour, and conserving judicial resources) depends in large part on the willingness of lawyers to undertake litigation at the risk that the expenses incurred in time and disbursements will never be recovered. Without a contingency agreement, many class actions would never see the light of day.<sup>36</sup>

[54] In 2011, after an exhaustive review of the case law, Justice Prévost concluded that the reasonable standard was somewhere between 20% and 25%.<sup>37</sup> This range remains relevant today although some have since approved higher<sup>38</sup> or lower<sup>39</sup> percentages. With regard to higher percentages, although some cases involving significant risk could justify them, one wonders what could justify a generalized inflation, given that since 2011, the procedure at the authorization stage has been considerably simplified.

[55] The fact that a percentage is within or outside this range is not decisive since it is on the basis of each class action that a judge must determine the reasonableness of class counsel fees.<sup>40</sup>

[56] Indeed, the reasonableness of the percentage depends on several other factors.

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<sup>34</sup> *Montgrain c. Banque Nationale du Canada*, 2006 QCCA 557, para. 53.

<sup>35</sup> *A.B. c. Clercs de Saint-Viateur du Canada*, *supra*, note 24, para. 57; *Pellemans c. Lacroix*, *supra*, note 26, para. 49; *Bouchard c. Abitibi Consolidated*, *supra*, note 21, para. 52.

<sup>36</sup> *Allen c. Centre intégré universitaire de santé et de services sociaux de la Capitale-Nationale*, *supra*, note 8, paras. 135 and 136; Peter W. KRYWORUK and Jacob DAMSTRA, «Revisiting Class Counsel Fee Approvals: Towards Presumptive Validity of Contingency Fee Agreements», (2021) 17 *Canadian Class Action Review* 109, pp. 117 and following; Pierre-Claude Lafond, *Libres propos sur la pratique de l'action collective*, Montréal, Éditions Yvon Blais, 2020, p. 274.

<sup>37</sup> *Abihisira c. Stubhub inc.*, *supra*, note 6, para. 70; *Marcil c. Commission scolaire de la Jonquière*, 2018 QCCS 3836, para. 80 (Request for revocation of judgment dismissed, 2020 QCCS 412).

<sup>38</sup> *F. c. Frères du Sacré-Coeur*, 2021 QCCS 3621, para. 172 (30%); *Bouchard c. Audi Canada inc.*, 2021 QCCS 10, paras. 38 and 43 (33% based on a multiplier of 0.9); *Chetrit c. Société en commandite Touram*, 2020 QCCS 51, para. 37 (30-35%); *Girard c. Vidéotron*, 2019 QCCS 2412, para. 33 (30%) (Motion for leave to appeal denied, 2019 QCCA 1531); *Jacques c. 189346 Canada inc. (Pétroles Therrien inc.)*, *supra*, note 8, para. 93 (39%).

<sup>39</sup> *Dorval c. Industrielle Alliance, assurances et services financiers inc.*, 2021 QCCS 139, para. 23 (12%); *Abihisira c. Stubhub inc.*, *supra*, note 37, para. 76 (15%); *Regroupement des citoyens du secteur des Constellations c. Ville de Lévis*, 2020 QCCS 1986, para. 89 (11%); *Allen c. Centre intégré universitaire de santé et de services sociaux de la Capitale-Nationale*, *supra*, note 36, para. 210 (18.2%); *Marcil c. Commission scolaire de la Jonquière*, *supra*, note 37, para. 122 (12%) (Application for revocation of judgment dismissed, 2020 QCCS 412), *Schachter c. Toyota Canada inc.*, 2014 QCCS 802, para. 113 (5%).

<sup>40</sup> *A.B. c. Clercs de Saint-Viateur du Canada*, *supra*, note 24, para. 57 quoting *Skarstedt c. Corporation Nortel Networks*, *supra*, note 33, para. 31.

[57] For example, where the amount of the settlement or judgment is very large or where the settlement occurs quickly,<sup>41</sup> a high percentage could lead to an unreasonable result. Similarly, when the value of the settlement is low, for example when the number of class members is less than expected, applying a higher percentage may be warranted to avoid undercompensating class counsel.<sup>42</sup>

[58] For this reason, courts have often suggested that percentages should be adjusted according to the stage of the proceeding and be degressive once certain financial milestones have been reached<sup>43</sup> even though there is no magical formula that can at all times and in all situations guarantee that the fees should ultimately be considered reasonable.<sup>44</sup>

[59] In addition, the monetary value of the settlement may not always be the most important benefit to the class members. For example, in some cases, an agreement by the defendant to modify its practice, to cease causing damages or an acknowledgement of harm or an apology may be more important to class members than a monetary award. The evaluation of a fair and reasonable compensation for class counsel should take this into account.

[60] For these reasons, the reasonableness of the percentage is also often considered in light of the actual time spent on the case. Where the application of a percentage results in a multiplier that is out of proportion to the norm (usually between 2 and 3),<sup>45</sup> it may be advisable to reduce the percentage although a mechanical application of this method and the establishment of rigid floors or ceilings should be avoided. The assessment of the reasonableness of fees should not be reduced to a simple mathematical operation.<sup>46</sup>

[61] The multiplier approach has itself been subject to criticism. For example, it has been said that it encourages lawyers to spend excessive hours engaging in duplicative and unjustified work, inflating their normal billing rates, even including fictitious hours and that it creates a disincentive for the early settlement of cases.<sup>47</sup> These concerns are valid.

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<sup>41</sup> See the comments of Justice Samson in *Allen c. Centre intégré universitaire de santé et de services sociaux de la Capitale-Nationale*, *supra*, note 36, paras. 129 to 132.

<sup>42</sup> *Cherit c. Société en commandite Touram*, *supra*, note 38, para. 37.

<sup>43</sup> *Allen c. Centre intégré universitaire de santé et de services sociaux de la Capitale-Nationale*, *supra*, note 36, paras. 129 to 132; *Option Consommateurs c. Banque Amex du Canada*, *supra*, note 30.

<sup>44</sup> *A.B. c. Clercs de Saint-Viateur du Canada*, *supra*, note 24, para. 58.

<sup>45</sup> *Sony BMG Musique (Canada) inc. c. Guilbert*, 2009 QCCA 231 (multiplier of 2.5); *Abihira c. Stubhub inc.*, *supra*, note 37, para. 78 (multiplier of 1.82); *Hurst c. Air Canada*, 2019 QCCS 4614, paras. 42 and 47 (multiplier of 1.15); *Allen c. Centre intégré universitaire de santé et de services sociaux de la Capitale-Nationale*, *supra*, note 36, paras. 175 and 209 (multiplier of 1.5); *Lépine c. Société canadienne des postes*, 2017 QCCS 1407, para. 30 (multiplier of 2.5); *Schachter c. Toyota Canada inc.*, *supra*, note 39 (multiplier of 2); *Sonogo c. Danone inc.*, 2013 QCCS 2616, para. 102 (multiplier of 3.2); *Association de protection des épargnants et investisseurs du Québec (APEIQ) c. Corporation Nortel Networks*, 2009 QCCS 2407, para. 196 (multiplier of 2) (Appeal dismissed, 2011 QCCA 767).

<sup>46</sup> *A.B. c. Clercs de Saint-Viateur du Canada*, *supra*, note 24, para. 62.

<sup>47</sup> *Ibid*, paras. 60 and 67; *F. c. Frères du Sacré-Coeur*, *supra*, note 38, paras. 163, 168 and 169; *Endean v. The Canadian Red Cross Society*, 2000 BCSC 971, para 16 (Affirmed by the Court of Appeal, 2000 BCCA 638).

Nonetheless, when used properly, the multiplier method is a useful tool for measuring or controlling the reasonableness of fees.<sup>48</sup>

[62] In order to avoid giving undue weight to the time spent of the file, the Court of Appeal suggests that the process of analysis should begin with an assessment of the other criteria set out in the *Code of Conduct* and a consideration of the risk assumed by counsel. If the court concludes that the amount (not the percentage) of fees payable is reasonable, the analysis can stop there. If, on the other hand, the class counsel fee appears to be unreasonable, it is appropriate to take into account the hours spent on the case and to apply a multiplier to adjust the amount of fees to make it reasonable.<sup>49</sup>

[63] The use of a multiplier is also useful when the number of members is unknown, making it impossible to determine the amount which will be collected.<sup>50</sup>

## 2.2 Discussion

[64] The mandate between Representative Plaintiff and LPC Avocat Inc. provides for compensation on the basis of a percentage of 30% of the amounts recovered or on the basis of a 3.5 times multiplier, whichever is higher.

[65] These percentages are on the high end of the percentage scale, but they need not be discussed here.

[66] Indeed, under the Settlement Agreement, Defendants agreed to pay a \$82,272.78 (including applicable taxes) in Class Counsel Fees plus \$15,000 (including taxes) in disbursements.<sup>51</sup>

[67] The amount of \$82,272.78 represents 22% of the value of the Settlement excluding disbursements. This number is within the usual range.

[68] In accordance with what is now common practice, the Parties agreed that an eventual reduction of the Class Counsel Fees would not affect the validity of the Settlement Agreement.<sup>52</sup>

[69] Applying the above criteria, the Court finds that the proposed Class Counsel Fees are reasonable and should be approved.

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<sup>48</sup> *A.B. c. Clercs de Saint-Viateur du Canada*, supra, note 24, para. 59; *Option Consommateurs c. Banque Amex du Canada*, supra, note 24, para. 65; *Skarstedt c. Corporation Nortel Networks*, supra, note 33, para. 35; *Association de protection des épargnants et investisseurs du Québec (APEIQ) c. Corporation Nortel Networks*, supra, note 45, para. 151; Bruce JOHNSTON and Yves LAUZON, *Traité pratique de l'action collective*, Montréal, Éditions Yvon Blais, 2021, p. 493.

<sup>49</sup> *A.B. c. Clercs de Saint-Viateur du Canada*, supra, note 24, para. 64.

<sup>50</sup> *Leung c. DoorDash Technologies Canada Inc.*, 2022 QCCS 1083, para. 70.

<sup>51</sup> Section 5 of the Settlement.

<sup>52</sup> Section 5.3 of the Settlement.

### 2.2.1 Experience and the Provision of Professional Services that Are Unusual or Require Special Skill or Exceptional Promptness

[70] Class actions require particular skills and experience. There are only a small number of attorneys who take on class action matters in Quebec and in Canada.

[71] Class Counsel has extensive experience in class action matters.<sup>53</sup>

### 2.2.2 The Difficulty of the Matter, the Responsibility Assumed and the Risk Involved

[72] Class Counsel prosecuted this litigation on a contingency-fee basis, incurring close to 100% of the risk. The only funding received was \$20,466.98 received from the *Fonds d'aide aux actions collectives* which Class Counsel undertakes to refund.

[73] As discussed above, the risk assumed here was important as is evidenced by the fact that authorization was initially refused.

[74] Moreover, it would be unfair to all parties involved for this court to decide that the result was easily achieved. One must be mindful that defendants often settle because they wish to avoid a precedent or a finding that they did something reprehensible.

[75] Thus, this criterion supports approval of the Class Counsel Fees.

### 2.2.3 The Importance of the Matter to the Client

[76] Although the claim involves relatively small sums of money for each Class Member, the Class Action was nonetheless important to them.

[77] Small claims involving complicated legal and evidentiary issues are particularly suited to class actions because consumers rarely have the means or the motivation to sue.

[78] Without this Class Action, Class Members would likely not have filed a claim or obtained compensation.

### 2.2.4 The Result Achieved

[79] The Settlement provides for a payment of \$286,166.21 to Class Members. This represents a 12% reduction on the price of their pass.

[80] The recovery process is simple and requires no effort for Class members to be paid which is an important consideration in deciding whether a settlement is fair and reasonable.

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<sup>53</sup> Exhibit R-4.

### 2.2.5 Objections by Class Members

[81] The Pre-Approval Notices mentioned that the Settlement provided for Class Counsel Fees of \$82,272.78 (including taxes) plus \$15,000 in disbursements.

[82] No one objected to the Class Counsel Fees.

### 2.2.6 Other Criteria

[83] There are no fees provided for by law or regulation. No disbursements, fees, commissions, rebates, expenses or other benefits will be paid by a third party in connection with the mandate.

[84] Therefore, those criteria are inapplicable here.

[85] The *Fonds d'aide aux actions collectives* supports the fee application.

[86] Given the above, a Class Counsel fee of \$82,272.78 (including taxes) plus \$15,000 in disbursements is reasonable and, as suggested by the Court of Appeal, the analysis could stop here.

[87] However, the analysis of the time spent on the matter also supports the approval of the Class Counsel Fees.

### 2.2.7 The Time and Effort Required and Expended on the Matter

[88] The Representative Plaintiff's Application to Authorize the Bringing of a Class Action was initially filed on June 8, 2020.

[89] It was originally dismissed on April 19, 2021. On March 23, 2022, the Court of Appeal overturned the first instance judgment and authorized the class action.

[90] On April 4, 2022, the Representative Plaintiff filed his Originating Application, which was subsequently amended on July 7, 2022.

[91] It took almost three years to reach a Settlement after the initial filing.

[92] Class Counsel worked over a total of 200 hours as of June 13, 2023. The unbilled time to date is more than \$80,000 before taxes.

[93] The work is ongoing. More legal fees were required for the settlement approval hearing, coordinating with the Claims Administrator, the Defendants and the Class Members as well as overseeing the implementation of the Settlement.

[94] The above represent a multiplier which is close to one.

[95] The Court concludes that the Class Counsel Fees are reasonable and in the interest of Class Members.

### **3. Reimbursement of Representative Plaintiff's Disbursements**

[96] The Settlement also provides for the reimbursement of a sum of \$500 for the disbursements of the Representative Plaintiff.

[97] Mr. Nashen has filed a sworn statement<sup>54</sup> supporting this estimate.

[98] The reimbursement is approved.

### **CONCLUSION**

[99] Analysis of the relevant criteria confirms that the Settlement and the Class Counsel Fees are reasonable.

[100] The Court approves them.

<b>POUR CES MOTIFS, LE TRIBUNAL :</b>	<b>FOR THESE REASONS, THE COURT:</b>
[101] <b>ACCUEILLE</b> la demande du Représentant en approbation de la transaction et pour approbation des honoraires des avocats du groupe;	<b>GRANTS</b> the Representative Plaintiff's Application to Approve a Class Action Settlement and for Approval of Class Counsel Fees;
[102] <b>DÉCLARE</b> que les définitions contenues dans la Transaction s'appliquent et sont incorporées au présent jugement, et en conséquence en font partie intégrante, étant entendu que les définitions lient les parties à la transaction;	<b>DECLARES</b> that the definitions set forth in the Settlement 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;
[103] <b>APPROUVE</b> la Transaction conformément à l'article 590 du <i>Code de procédure civile du Québec</i> et <b>ORDONNE</b> aux parties de s'y conformer;	<b>APPROVES</b> the Settlement as a transaction pursuant to article 590 of the <i>Code of Civil Procedure</i> and <b>ORDERS</b> the parties to abide by it;
[104] <b>DÉCLARE</b> que la Transaction (incluant son préambule et ses annexes) est juste, raisonnable et qu'elle est dans l'intérêt fondamental 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;	<b>DECLARES</b> that the Settlement (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 Members set forth herein;

<sup>54</sup> Sworn statement of Mr. Barry Nashen dated June 14, 2023, Exhibit R-5.

[105] <b>ORDONNE</b> et <b>DÉCLARE</b> que le présent jugement, incluant la Transaction réglant l'action collective, lie chaque Membre du Groupe;	<b>ORDERS</b> and <b>DECLARES</b> that this judgment, including the Settlement, shall be binding on every Class Member;
[106] <b>APPROUVE</b> le paiement aux Avocats du Groupe de leurs honoraires extrajudiciaires et débours comme prévu à la section 5 de la Transaction;	<b>APPROVES</b> the payment to Class Counsel of its extrajudicial fees and disbursements as provided for in section 5 of the Settlement;
[107] <b>APPROUVE</b> le versement du débours de 500 \$ au demandeur, comme prévu au paragraphe 5.2 de la Transaction;	<b>APPROVES</b> the payment of a disbursement to the Representative in the amount of \$500.00, as provided for in section 5.2 of the Settlement Agreement;
[108] <b>PREND ACTE</b> de l'engagement et de l'obligation des Avocats du Groupe à rembourser au Fonds d'aide aux actions collectives la somme de 20 466,98 \$ dans les 30 jours de la date d'entrée en vigueur du jugement à intervenir;	<b>PRAYS ACT</b> of Class Counsel's undertaking and obligation to reimburse the <i>Fonds d'aide aux actions collectives</i> the sum of \$20,466.98 within 30 days of the effective date of the judgment to be rendered;
[109] <b>ORDONNE</b> que les frais de l'administrateur et les frais relativement à l'envoi des avis soient assumés par les défenderesses;	<b>ORDERS</b> that the Administrator's fees and the costs of the notices be borne by the defendants;
[110] <b>ORDONNE</b> aux parties de faire rapport de l'exécution du jugement à l'expiration de la période mentionnée au paragraphe 3.6 de la Transaction;	<b>ORDERS</b> the Parties, upon the expiry of the period mentioned in section 3.6 of the Settlement, to render an account of the execution of the judgment;
[111] <b>LE TOUT</b> sans frais de justice.	<b>THE WHOLE</b> without legal costs.

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MARTIN F. SHEEHAN, J.S.C.

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Hearing date: June 20, 2023