

SUPERIOR COURT

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTRÉAL

No.: 500-06-001075-205

DATE: May 3, 2023

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

BARRY NASHEN

Applicant

v.

STATION MONT TREMBLANT SOCIÉTÉ EN COMMANDITE

and

ALTERRA MOUNTAIN COMPANY

Defendants

JUDGMENT

(On an Application to Approve Notices of a Settlement Approval Hearing and to
Appoint a Claims Administrator)
(Articles 25, 49, 576, 579, 581 and 590 C.C.P.)

[1] The Court is seized with an Application to approve notices in anticipation of a settlement approval hearing and to appoint a claims administrator (the “**Claims Administrator**”).

[2] The parties agree on the text of the notices as well as on the appointment of KPMG as the Claims Administrator.

CONTEXT

[3] On March 23, 2022, the Court of Appeal¹ 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:

<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 (the “Class Members”).</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 » (les « Membres du Groupe »).</p>
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[4] The Court of Appeal referred questions relating to the time limit for opting out of the class as well as to the publication of a notice to members, to the judge who would be designated to manage the class action.

[5] On April 4, 2022, the Representative Plaintiff filed his Originating Application, which was subsequently amended on July 7, 2022 (the “**Originating Application**”).

[6] The Representative Plaintiff alleges that the Defendants failed to respect the *Civil Code of Quebec* (“**C.C.Q.**”) and the *Consumer Protection Act*² by failing to reimburse class members for the days during which Station Mont Tremblant was forced to close due to Covid-19. He sought compensatory and punitive damages.

[7] The Defendants deny any wrongdoing.

[8] On May 25, 2022, the parties informed the Court that they planned to participate in a settlement conference (“**CRA**”) and asked the Court to suspend proceedings until after the CRA. The Court agreed to the suspension³.

[9] Notices informing the Class Members of the authorization of the class action and offering them the opportunity to opt out (articles 576 and 579 of the *Code of Civil Procedure* (“**C.C.P.**”)) were never sent.

[10] The CRA was successful, and the parties agreed to settle the class action (the “**Settlement Agreement**”).⁴

[11] Pursuant to article 590 C.C.P., the Settlement Agreement must be approved by the Court.

¹ *Nashen c. Station Mont-Tremblant*, 2022 QCCA 415.

² *Consumer Protection Act*, CQLR, c. P-40.1.

³ Procès-verbal of June 10, 2022.

⁴ Exhibit R-1.

[12] Before the settlement approval hearing can take place, notices must be sent to the Class Members to advise them that a class action was authorized (article 576 C.C.P.) and that a hearing will take place to approve the Settlement Agreement (article 590 C.C.P.).

ANALYSIS

1. The Notices

[13] The authorization of a class action requires sending a notice to the members (article 576 C.C.P.) (the “**Authorization Notice**”), which must include (article 579 C.C.P.):

- 13.1. a description of the affected class;
- 13.2. the principal issues raised by the class action and the conclusions sought;
- 13.3. the name of the representative plaintiff, the name and address of his or her counsel and the district in which the class action will be brought;
- 13.4. the right of class members to opt out of the class, the procedure to be followed and the time limit for opting out;
- 13.5. the fact that a member who is not the representative or an intervenor will not be called upon to pay the legal costs of the class action; and
- 13.6. any other information that is considered necessary, such as the web address of the class action registry.

[14] A notice given in anticipation of a settlement approval hearing (article 590 C.C.P.) (the “**Settlement Approval Notice**”) must include:

- 14.1. the date and place on which the settlement will be submitted to the court for approval;
- 14.2. the nature of the transaction, the method of execution chosen and the procedure to be followed by Class Members to prove their claim;
- 14.3. information about Class members’ right to make representations before the court regarding the proposed transaction and the distribution of any remaining balance.

[15] Even though the Authorization Notice and the Settlement Approval Notice have different objectives, nothing prevents combining these notices into one in appropriate cases as long as the contents of the combined notice meet the legislative and jurisprudential requirements.⁵

[16] Notices play a crucial role in class actions as the preservation of individual class members rights relies on the timely transmission of relevant information. Notices are more than a mere procedural requirement. They guarantee that the class action respects the paramount principles of public order and fairness. This is especially true of notices sent prior to the right to opt out of a class action. “Although it does not have to be shown that each member was actually informed, the way the notice procedure is designed must make it likely that the information will reach the intended recipients.”⁶

[17] The language used should be simple and accessible to the average reader. Legal jargon should be avoided so that the notice is clearly understood by the members.⁷ The notice must be “clear and concise”.⁸

[18] As for dissemination, the appropriate means must be chosen to reach the members where they are. The court must determine the time, form and manner of publication “having regard to the nature of the class action, the composition of the class and the geographical location of its members.”⁹ Individual notification of members should be preferred when circumstances allow it.¹⁰

[19] The objective remains to reach the largest number of members while ensuring that the costs incurred are proportionate to the nature and purpose of the demand.¹¹

⁵ Éric DUNBERRY and Catherine MARTEL, « Les transactions et les mesures alternatives de règlement dans le cadre d'un recours collectif » in *Développements récents : Développements récents en recours collectifs* (2010), vol. 327, Cowansville, Éditions Yvon Blais, 2010, pp. 185 to 190.

⁶ *Canada Post Corp. v. Lépine*, 2009 SCC 16, paras. 42 and 43; *Meubles Léon Itée c. Option consommateurs*, 2020 QCCA 44, para. 78; *Hocking c. Haziza*, 2008 QCCA 800, para. 119, justice Chamberland in dissent but approved by the majority as to the principle, para. 229; *Lévesque c. Vidéotron s.e.n.c.*, 2015 QCCS 3561, para. 10; Yves LAUZON and Anne-Julie ASSELIN, « Article 579 », EYB2019GCO591.

⁷ Barreau du Québec, *Actions collectives : Guide sur les avis aux membres*, 2016, p. 8, online : <<https://www.barreau.qc.ca/media/1335/guide-avis-membres-action-collective.pdf>>; *Hocking c. Haziza*, *supra*, note 6, para. 116; *Boyer c. Agence métropolitaine de transport (AMT)*, 2010 QCCS 4984, para. 9 and 10.

⁸ Art. 581 C.C.P.

⁹ Art. 579(2) C.C.P.

¹⁰ *Chevalier c. Air Transat AT inc.*, 2022 QCCS 671, para. 26; *Huard c. Innovation Tootelo inc.*, 2021 QCCS 4209, para. 32; *Asselin c. Desjardins Cabinet de services financiers inc.*, 2021 QCCS 1340, para. 28; Y. LAUZON and A.-J. ASSELIN, *supra*, note 6.

¹¹ Barreau du Québec, *Actions collectives : Guide sur les avis aux membres*, *supra*, note 7, p. 7; *Defrance c. Banque de Montréal*, 2019 QCCS 4615, para. 11; *Asselin c. Desjardins Cabinet de services financiers inc.*, *supra*, note 10, paras. 13 to 27; *A.B. c. Clercs de Saint-Viateur*, 2019 QCCS 1521, para. 22; *Boyer c. Agence métropolitaine de transport (AMT)*, *supra*, note 7, paras. 10 and 11; *Comments of the Minister*

[20] The proposed French and English versions of the notices, included as Schedule A and Schedule B to the Settlement (the “**Notices**”), meet these requirements. They are approved.

[21] With regard to the distribution protocol, the parties have agreed that the Notices will be disseminated to Class Members in accordance with sections 2.1 to 2.5 of the Settlement, namely:

21.1. the Claims Administrator will email the Notices to the Settlement Class Members;

21.2. The Notices and all relevant settlement documents shall be posted on the Claims Administrator's website at www.kpmg.com/ca/actioncollectivetonik and www.kpmg.com/ca/classactiontonik;

21.3. The Notices shall also be prominently posted on Class Counsel's website at www.lpclex.com/tonik and www.lpclex.com/fr/tonik;

21.4. The Class Notice shall be uploaded to the Quebec Class Action Registry.

[22] The proposed dissemination protocol is also appropriate in the circumstances.

[23] The parties suggest that the time limit for Class Members to file objections to the Settlement Agreement be thirty days following the communication by email of the Notices and that the same delay be applicable for Class Members to opt out of the class action.

2. The Claims Administrator

[24] The parties have agreed that the Notices be sent by the Claims Administrator.

[25] Therefore, it is appropriate that the Claims Administrator be appointed at this time.

[26] At the Defendants' request, KPMG has agreed to act as Claims Administrator pursuant to the Settlement Agreement and is prepared to faithfully abide by the terms of the Settlement Agreement to act in that capacity, subject to the supervision of the Court.

[27] Both parties agree to appoint KPGM as Claims Administrator and that the Defendants will be entirely and solely responsible for their remuneration.

of Justice on art. 579 C.C.P.; Pierre-Claude LAFOND, Le recours collectif, le rôle du juge et sa conception de la justice. Impact et évolution, Cowansville, Éditions Yvon Blais, 2006, p. 170.

FOR THESE REASONS, THE COURT:	POUR CES MOTIFS, LE TRIBUNAL :
[28] GRANTS the Application to Approve Notices, the Notice Plan and to Appoint a Claims Administrator;	ACCUEILLE la demande pour approuver les avis, le protocole de distribution et la nomination de l'administrateur;
[29] ORDERS that the definitions found in the Settlement Agreement apply to the present Judgment except if specifically modified herein;	ORDONNE que les définitions figurant dans la Transaction s'appliquent au présent jugement, sauf si elles sont spécifiquement modifiées dans le présent jugement;
[30] APPROVES the Notices to Class Members, in their French and English versions, substantially in the form of Schedule A and Schedule B to the Settlement Agreement;	APPROUVE les avis aux membres du Groupe, dans les versions française et anglaise, substantiellement sous la forme de l'annexe A et l'annexe B de la Transaction;
[31] APPROVES the Notice Plan provided in section 2 of the Settlement Agreement;	APPROUVE le plan de notification prévu à l'article 2 de la Transaction;
[32] ORDERS that the Short-Form Notice to Class Members, in its French and English version, substantially in the form of Schedule A and Schedule B to the Settlement Agreement, shall be disseminated in accordance with the Notice Plan (section 2 of the Settlement Agreement), the costs of which shall be paid by the Defendants, regardless of whether the Settlement Agreement is approved;	ORDONNE que l'avis abrégé aux membres du Groupe, dans ses versions française et anglaise, substantiellement sous la forme de l'annexe A et l'annexe B de la Transaction, soit diffusé conformément au plan de notification (article 2 de la Transaction), dont les coûts seront payés par les Défenderesses, peu importe si la Transaction est approuvée ou non;
[33] DECLARES that Class Members who wish to object to the approval of the Settlement Agreement must do so in the manner provided for in the Short-Form Notice (Schedule A to the Settlement Agreement) by June 16, 2023 ;	DÉCLARE que les membres du Groupe qui souhaitent s'opposer à l'approbation de la Transaction par le tribunal doivent le faire de la manière prévue dans l'avis abrégée (annexe B à la Transaction) au plus tard le 16 juin 2023 ;

<p>[34] DECLARES that Class Members who wish to opt out from the class action may do so by delivering a written notice confirming their intention to opt out of this class action, in the manner provided for in the Short-Form Notice (Schedule A to the Settlement Agreement) by June 16, 2023;</p>	<p>DÉCLARE que les membres du Groupe qui souhaitent s'exclure de l'action collective peuvent le faire en envoyant un avis écrit confirmant leur intention de s'exclure de l'action collective, de la manière prévue dans l'avis abrégé (annexe B à la Transaction) au plus tard le 16 juin 2023;</p>
<p>[35] DECLARES that all Class Members who have not requested their exclusion will be bound by any judgment to be rendered in the class action in the manner provided for by the law;</p>	<p>DÉCLARE que tous les membres du Groupe qui n'ont pas demandé leur exclusion seront liés par tout jugement à rendre sur l'action collective de la manière prévue par la loi;</p>
<p>[36] ORDERS that KPMG be appointed as Claims Administrator;</p>	<p>ORDONNE que KPMG soit nommé Administrateur des réclamations;</p>
<p>[37] ORDERS that the Defendants disclose to the Claims Administrator the names, emails, mailing addresses and all necessary identifying information of Class Members that Defendants hold in order to:</p> <ul style="list-style-type: none"> a) facilitate the distribution of Court approved notices to Class Members advising them of this Judgment and the date and information relating to the settlement approval hearing; and b) facilitate the process for the eventual administration arising from any later judgment approving the Settlement Agreement. 	<p>ORDONNE que les Défenderesses divulguent à l'Administrateur des réclamations les noms, courriels, adresses postales et toutes les informations d'identification nécessaires des membres du Groupe que les Défenderesses détiennent afin de :</p> <ul style="list-style-type: none"> a) faciliter la distribution d'un avis approuvé par le tribunal aux membres du Groupe les informant de ce jugement et de la date et des informations relatives à l'audience d'approbation de la Transaction; et b) faciliter le processus d'administration découlant de tout jugement ultérieur approuvant la Transaction;
<p>[38] ORDERS that the Claims Administrator shall maintain confidentiality over and shall not share the information provided pursuant to this Order with any other person, including, but not limited to any lawyer (except Class Counsel and any</p>	<p>ORDONNER que l'Administrateur des réclamations maintienne la confidentialité et ne partage pas les informations fournies en vertu de cette ordonnance avec toute autre personne, y compris, mais sans s'y limiter, avec tout avocat (à l'exception des</p>

<p>lawyers retained by the Claims Administrator), unless doing so is strictly necessary for executing the Notice Plan and/or facilitating the claims administration process in accordance with the Settlement Agreement;</p>	<p>Avocats du groupe et des avocats retenus par l'Administrateur des réclamations), à moins que cela ne soit strictement nécessaire pour exécuter le Plan de notification et/ou faciliter le processus d'administration des réclamations conformément à la Transaction;</p>
<p>[39] ORDERS that the Claims Administrator shall use the information provided to it pursuant to this Judgment for the sole purpose of executing the notice plan and facilitating the administration process in accordance with the Settlement Agreement and for no other purpose;</p>	<p>ORDONNE que l'Administrateur des réclamations utilise les informations qui lui sont fournies conformément au présent jugement dans le seul but d'exécuter le plan de notification et de faciliter le processus d'administration conformément à la Transaction et à aucune autre fin;</p>
<p>[40] ORDERS and DECLARES that this Judgment constitutes a Judgment compelling the production of the information by the Defendants within the meaning of applicable privacy laws, and that this Judgment satisfies the requirements of all applicable privacy laws;</p>	<p>ORDONNE et DÉCLARE que le présent jugement constitue un jugement obligeant la production des informations par les Défenderesses au sens des lois applicables en matière de protection de la vie privée, et que le présent jugement satisfait aux exigences de toutes les lois applicables en matière de protection de la vie privée;</p>
<p>[41] RELEASES the Defendants from any and all obligations pursuant to applicable privacy laws and regulations in relation to the communication of any personal and/or private information to Class Counsel or the Claims Administrator;</p>	<p>DÉGAGE les Défenderesses de toute obligation en vertu des lois et réglementations applicables en matière de protection de la vie privée en ce qui concerne la communication de toute information personnelle et/ou privée aux Avocats du Groupe ou à l'Administrateur des réclamations;</p>
<p>[42] SCHEDULES the settlement approval hearing on June 20, 2023, at the Montreal Courthouse at 9:30 A.M. in room 16.06;</p>	<p>FIXE l'audience d'approbation de la Transaction au 20 juin 2023, au Palais de justice de Montréal à 9 h 30 en salle 16.06;</p>
<p>[43] ORDERS that the place, date and time of the settlement approval hearing may be subject to modification by the Court without further publication notice to the Class Members, other than such</p>	<p>ORDONNE que l'endroit, la date et l'heure de l'audience d'approbation de la Transaction peuvent être ajournées par la Cour sans autre avis de publication aux membres du Groupe, à l'exception de</p>

notice which will be posted on Class Counsel's website (www.lpclex.com/tonik) and the Settlement Website;	l'avis qui sera affiché sur le site Web des avocats du Groupe (www.lpclex.com/fr/tonik) et sur le site Web du règlement;
[44] THE WHOLE , without costs.	LE TOUT , sans frais de justice.

MARTIN F. SHEEHAN, J.S.C.

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