# SUPERIOR COURT

(Class Action Division)

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTRÉAL

No.: 500-06-001215-231

DATE: March 26, 2024

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

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**MATHIEU TRUDELLE**
Plaintiff
**v.**
**TICKETMASTER CANADA LP**
and
**TICKETMASTER CANADA HOLDINGS ULC**
and
**TICKETMASTER CANADA ULC**
and
**TICKETMASTER LLC**
and
**CUMIS GENERAL INSURANCE COMPANY**
and
**AZGA INSURANCE AGENCY CANADA LTD.**
and
**AZGA SERVICE CANADA INC.**
Defendants

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**JUDGMENT ON APPLICATION TO APPROVE A CLASS ACTION SETTLEMENT AND CLASS COUNSEL FEES**

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JS 1699

## OVERVIEW

[1] Plaintiff, Mr. Mathieu Trudelle, requests that the Court:

1.1. Approve the settlement of the class action (the "**Settlement Agreement**")[1] that he reached with the defendants Ticketmaster Canada LP, Ticketmaster Canada Holdings ULC, Ticketmaster Canada ULC, Ticketmaster LLC, CUMIS General Insurance Company, AZGA Insurance Agency Canada Ltd. and AZGA Service Canada Inc. (collectively, the "**Defendants**");

1.2. Approve the professional fees and disbursements of class counsel.

[2] The application is granted in part.

[3] The agreement is fair, equitable and in the best interests of the class members. It is approved.

[4] As for Class Counsel Fees,[2] the Court approves a preliminary payment of $500 000 plus applicable taxes and disbursements. It postpones the final determination as to the reasonableness of Class Counsel Fees until the Settlement Administrator is ready to proceed with the payment of the Settlement Fund to the Settlement Class Members.

[5] The background is as follows.

## CONTEXT

[6] On January 18, 2023, Mr. Trudelle filed an Application to Authorize the Bringing of a Class Action and Appoint the Status of Representative Plaintiff against the Defendants (the "**Application for Authorization**").

[7] Plaintiff alleged that during the class period, Defendants sold "Event Ticket Protector" insurance in a misleading and deceitful manner, in violation of sections 54.4, 219 and 224 of Quebec's *Consumer Protection Act* (the "**CPA**")[3] and section 52 of the *Competition Act*.[4]

[8] On January 30, 2024, the Court: (i) authorized the class action against the Defendants for settlement purposes only and appointed Mr. Trudelle as Representative Plaintiff; (ii) approved the form and content of the Pre-Approval Notice and the Opt-Out Form; (iii) fixed the deadline for Class Members to opt out of the class action or object to the Settlement to March 4, 2024; (iv) appointed Concilia Services Inc. as the Settlement

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1 Exhibit R-1.
2 Capitalized terms not defined in the present judgment refer to the definitions contained in the Settlement Agreement.
3 *Consumer Protection Act*, L.R.Q., c. P-40.1.
4 *Competition Act,* RSC, 1985, c. C-34.

Administrator; and (v) scheduled the Settlement approval hearing on March 12, 2024 (the "**Pre-Approval Judgment**").

[9] The authorized class was defined as:

| | |
|---|---|
| All persons who, from August 2, 2019, to March 31, 2023, inclusively, purchased the Insurance on the Platforms using a billing address in the Province of Quebec whether or not they submit a Claim Form, except those persons who already received a refund for the Insurance or submit a valid Opt Out Form within the Opt-Out Period. | Toutes les personnes qui, entre les 2 août 2019 et 31 mars 2023 inclusivement, ont acheté l'Assurance sur les Plateformes en utilisant une adresse de facturation dans la province de Québec, qu'elles soumettent ou non un Formulaire de Réclamation, à l'exception des personnes qui ont déjà reçu un remboursement pour l'Assurance ou qui soumettent un Formulaire d'Exclusion valide au cours de la Période d'Exclusion. |

## ANALYSIS

[10] 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.[5]

[11] Once a class action is authorized, the Court continues to look out for the interests of absent class members.[6]

[12] The absence of a specific mandate for the representative and the court's duty to look after the interests of the members underly the need for court approval of:

12.1. a settlement or discontinuance of the class action; and

12.2. class counsel fees, even when there is a fee agreement in place between the representative and class counsel.

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5 *L'Oratoire Saint-Joseph du Mont-Royal* v. *J.J.*, 2019 SCC 35, para. 6.

6 *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*, 5th 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.

[13] 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.[7]

## 1. IS THE PROPOSED SETTLEMENT AGREEMENT FAIR, EQUITABLE AND IN THE BEST INTERESTS OF CLASS MEMBERS?

### 1.1 Applicable Law

[14] Article 590 of the *Code of Civil Procedure* ("**C.C.P.**") provides that approval of a class-action settlement 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.[8]

[15] 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.[9] In doing so, the court must weigh the respective benefits and disadvantages of the settlement agreement for the class members.[10] It must bear 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.[11] Finally, the court must ensure that the integrity of the judicial process is maintained.[12]

[16] Quebec courts have overwhelmingly adopted the following criteria developed by Mr. Justice Sharpe in *Dabbs* v. *Sun Life Assurance Co. of Canada*:[13]

16.1. the likelihood of success of the class action;

16.2. the importance and nature of the evidence adduced;

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7 *L'Oratoire Saint-Joseph du Mont-Royal* v. *J.J.*, *supra*, note 5, para. 6; *Western Canadian Shopping Centres Inc.* v. *Dutton*, 2001 SCC 46, paras. 27 to 29; *Abihsira* c. *Stubhub inc.*, 2020 QCCS 2593, para. 24.

8 Catherine PICHÉ, *Le règlement à l'amiable de l'action collective*, Cowansville, Éditions Yvon Blais, 2014, pp. 191 and 192.

9 *Option Consommateurs* c. *Banque Amex du Canada*, *supra*, note 6, 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 6.

10 *Option Consommateurs* c. *Banque Amex du Canada*, *supra*, note 6, para. 84; *Conseil québécois sur le tabac et la santé* c. *JTI-MacDonald Corp.*, 2011 QCCS 4981, para. 49.

11 *Arrouart* c. *Anacolor inc.*, 2019 QCCS 4795, para. 20.

12 C. PICHÉ, *supra*, note 8, p. 164.

13 Adopted from *Dabbs* v. *Sun Life Assurance Co. of Canada*, [1998] O.J. No. 1598 (Q.J.) (Gen. Div.), para. 15.

16.3. the terms and conditions of the settlement;

16.4. the recommendation of counsel and their experience or of a neutral third party, if applicable;

16.5. the cost of future expenses and the probable duration of the litigation;

16.6. the number and nature of objections to the settlement agreement; and

16.7. the good faith of the parties and the absence of collusion.

[17] 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.[14] Moreover, at the approval stage, the court generally has only limited knowledge of the circumstances of the dispute and issues involved.[15]

[18] Nonetheless, while the court must remain vigilant, in the absence of a violation of public policy,[16] the court must approve a settlement if it meets the criteria and is in the best interests of class members.[17]

[19] Courts must encourage negotiated settlements, as this is generally in the best interests of the parties. 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."[18]

[20] Also, reducing the time between the filing of a claim and the distribution of benefits has an impact on the claims' rate and the ability of members to support their claim.[19] For the same reason, a simple, quick and efficient claims process that minimizes administrative costs argues in favour of settlement approval.[20]

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14 *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 9, para. 33.
15 *Pellemans* c. *Lacroix*, *supra*, note 14, para. 21.
16 *M.G.* c. *Association Selwyn House*, 2008 QCCS 3695, para. 22.
17 *Jacques* c. *189346 Canada inc. (Pétroles Therrien inc.)*, *supra*, note 9, para. 11.
18 L. CHAMBERLAND, J.-F. ROBERGE, S. ROCHETTE and al., *supra*, note 6.
19 *Beauchamp* c. *Procureure générale du Québec*, 2019 QCCS 2421, para. 57.
20 *Id.*, paras. 33 and 40.

[21] 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. It must be remembered that since settlement discussions are protected by privilege, the reasons for these compromises are not always disclosed.[21]

[22] The court may 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.[22] The proposed release must be carefully drafted to ensure that it does not absolve defendants of liability for conduct that does not fall within the complaint or for which the class members are not being compensated.[23]

### 1.2 Discussion

[23] The Pre-Approval Notices and relevant settlement documents were disseminated and published in accordance with the Pre-Approval Judgment.[24]

[24] The only remaining issue is whether the settlement is reasonable in light of the criteria set out by the courts.

[25] Applying the above criteria, the settlement submitted to the Court is fair, reasonable and in the interest of the Members.

[26] The Court approves it.

#### 1.2.1 The likelihood of success of the action

[27] As is often the case, Plaintiff believes he had a good case. Defendants vigorously contest this opinion.

[28] For the purpose of the present application, it is not necessary to decide who was right. In fact, given that a settlement is often reached to avoid a judicial ruling on the contested issues, it would be inappropriate to comment at length.

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21 *Option Consommateurs* c. *Banque Amex du Canada*, *supra*, note 6, 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.

22 *Option Consommateurs* c. *Banque Amex du Canada*, *supra*, note 6, paras. 37 and 74; *Bouchard* c. *Abitibi Consolidated*, *supra*, note 9, para. 17; L. CHAMBERLAND, J.-F. ROBERGE, S. ROCHETTE and al., *supra*, note 6.

23 *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.

24 Exhibit R-3.

[29] Suffice it to say that the jurisprudence on article 224 of the CPA is evolving. Plaintiffs are not always successful.[25] There were certainly risks that: (i) the case would not be successful on the merits; (ii) that damages would have been difficult to prove – even with the assistance of the experts; and (iii) that it may have been difficult to ensure that Class Members receive compensation after many years of litigation (due for example to difficulties in identifying Class Members who have changed emails, deceased, etc.).

[30] Furthermore, a successful judgment may always be appealed resulting in increased risk and additional delays.

[31] A settlement alleviates these risks.

#### 1.2.2 The importance and nature of the evidence adduced

[32] The Settlement Agreement occurred prior to authorization.

[33] However, during the course of their settlement negotiations, Defendants provided information to the Plaintiff and Class Counsel on a confidential basis.

[34] This information allows the Court to conclude that the guaranteed cash value of the Settlement Agreement ($3,300,000.00) in relation to the value of the released claims is significant.[26]

[35] It also confirms that Defendants implemented business practice changes which will be discussed below. These changes affected the potential success of Plaintiff's injunctive remedy.

#### 1.2.3 The terms and conditions of the settlement

[36] The class contains approximately 327,181 Class Members.[27]

[37] The Settlement Agreement provides that the Defendants will pay a Settlement Amount of $3.3 million.[28] This amount will be used to pay:

37.1. Class Counsel Fees and disbursements;

37.2. Settlement Expenses (including the fees of the Settlement Administrator); and

37.3. Approved Claims.

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[25] *Lussier* c. *Expedia inc.*, 2024 QCCS 472, paras. 65 to 75; *Union des consommateurs* c. *Air Canada*, 2022 QCCS 4254, paras. 140, 149, 150, 154, 157 and 160 (Declaration of Appeal, 2022-12-29 (C.A.) 500-09-030343-222).

[26] Exhibit R-2.

[27] Exhibit R-2.

[28] Exhibit R-1, para. 1(aa).

[38] Any amount left will be equally split between two charities identified by the parties.[29]

[39] No part of the Settlement Amount will revert to the Defendants.

[40] The claims process is simple.

[41] Class Members must click a link in the notice to fill in an online Claim Form.[30] They need to attest that, at the time of purchase, they did not understand that an amount was to be charged to them for Insurance over and above the amount paid for the tickets. No proof of purchase or other documentation is required. Class Members who submit their claim will receive an Interac e-transfer with the amount of their refund to their email address.

[42] Depending on the number of claims received and approved, Class Members will receive between 30% to 100% of the price paid for their Insurance, including taxes (less any refund they received).[31]

[43] Furthermore, Class Members: (i) fully benefited from their Insurance policies for those events which have already taken place; (ii) keep the benefits of their Insurance even if they obtained a refund; (iii) can claim a refund for multiple purchases/transactions; and (iv) can still claim a refund under the Settlement Agreement even if they presented an Insurance claim and were paid for it.

[44] Finally, as of March 31, 2023, Defendants modified their business practice to ensure that the decision to purchase Insurance is an enlightened one.[32] As Plaintiff had already obtained a reimbursement of his insurance premium, this was one of his main objectives.

[45] These terms convey significant advantages to the class.

#### 1.2.4 The recommendation of counsel and their experience or of a neutral third party, if applicable

[46] The Settlement Agreement was reached between counsel who have significant experience in class actions.

[47] Both of them recommend approval of the Settlement Agreement.

[48] Plaintiff approved the Settlement Agreement and signed it on his own behalf and on behalf of the Class Members.

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29 Exhibit R-5.
30 Exhibit R-1, Schedule E.
31 Exhibit R-1, paras. 1(j), 1(t), 25 and 39.
32 Exhibit R-1, paras. 27 to 30 and Schedules C and D.

1.2.5 The cost of future expenses and the probable duration of the litigation;

[49] The case is at its early stages.

[50] The cost of further litigation would have been high.

[51] Experts may have been required to establish damages.

[52] Without a settlement, resolution of the matter could have been postponed several years. Further appeals could have added to this delay.

1.2.6 The number and nature of objections to the agreement

[53] Notices were sent directly to Class Members using their last known email address.[33]

[54] No one objected to the Settlement Agreement.

[55] Eighty-seven people opted out.[34]

[56] Given that the class comprises 327,181 people, the proportion of opt-outs to total class is extremely low (87 / 327,181 = 0.0265%).

[57] Class Counsel indicates that many Class Members have contacted him to support the settlement.

[58] While many Class Members were present at the approval hearing, no one spoke to oppose the settlement.

1.2.7 The good faith of the parties and the absence of collusion

[59] There is no issue in this regard.

[60] The Settlement Agreement was negotiated at arm's length, in utmost good faith and without collusion between the parties.

1.2.8 Conclusion

[61] The Settlement Agreement is approved.

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33 Exhibit R-3.
34 Exhibit R-4.

## 2. ARE THE CLASS COUNSEL FEES FAIR, REASONABLE AND IN THE BEST INTERESTS OF CLASS MEMBERS?

### 2.1 Applicable Law

[62] 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".[35]

[63] The existence of an agreement between the representative plaintiff and his or her counsel is relevant to the issue as it benefits from a presumption of validity. Nonetheless, that agreement is not binding on the court, who must ensure that the fees of class counsel are, in fact, reasonable.[36] While it is true that the fee agreement signed by the representative plaintiff is binding on the class members,[37] the class members did not consent to it. This explains why the legislator specifically mandated the court to exercise its supervisory role in the interests of the other class members.[38]

[64] Thus, the court should not hesitate to review class counsel 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.[39] 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, quite often erroneously, attribute to class actions.[40] Class actions must not merely become a source of enrichment for plaintiff's lawyers or a source of funding for non-profit organizations.[41]

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35 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 6, para. 60.

36 Art. 593 C.C.P.; *A.B.* c. *Clercs de Saint-Viateur du Canada*, *supra*, note 35, para. 51; *Option Consommateurs* c. *Banque Amex du Canada, supra*, note 35, 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.

37 *A.B.* c. *Clercs de Saint-Viateur du Canada*, *supra*, note 35, para. 50; *Pellemans* c. *Lacroix*, *supra*, note 14, para. 48.

38 *Option Consommateurs* c. *Banque Amex du Canada*, *supra*, note 6, para. 67; *Option Consommateurs* c. *Infineon Technologies, a.g.*, *supra*, note 21, para. 65.

39 *A.B.* c. *Clercs de Saint-Viateur du Canada*, *supra*, note 35, para. 51; *Apple Canada Inc.* c. *St-Germain*, 2010 QCCA 1376, para. 36.

40 *A.B.* c. *Clercs de Saint-Viateur du Canada*, *supra*, note 35, para. 55; *Option Consommateurs* c. *Infineon Technologies, a.g.*, *supra*, note 21, para. 68.

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

[65] 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.[42]

[66] In assessing the fairness and proportionality of fees, the case law confirms that the court may be guided by the criteria set out in section 102 of the *Rules of Professional Conduct for Advocates:*[43]

66.1. Experience of class counsel;

66.2. The time and effort required and spent on the matter;

66.3. The difficulty of the matter;

66.4. The importance of the matter to the class;

66.5. The provision of professional services that are unusual or require special skill or exceptional promptness

66.6. The result achieved;

66.7. Any fees provided for by law or regulation; and

66.8. 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.

[67] These factors are not exhaustive, and their relative weight may vary according to the particular circumstances of the matter at hand.[44]

[68] For example, in the class action context, the judge must also consider the risk faced by class counsel. This factor may even take precedence over the time lawyers devoted to the case.[45] The risk should be assessed at the time counsel accepted the retainer rather than at the time of the fee approval application.[46] 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.

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42 *A.B.* c. *Clercs de Saint-Viateur du Canada*, *supra*, note 35, para. 51 quoting Catherine PICHÉ, *L'action collective : ses succès et ses défis*, Montréal, Les Éditions Thémis, 2019, p. 227.

43 *Code de déontologie des avocats*, R.R.Q., c. B-1, r. 3.1, art. 101 and 102.

44 *A.B.* c. *Clercs de Saint-Viateur du Canada*, *supra*, note 35, para. 53.

45 *Pellemans* c. *Lacroix*, *supra*, note 14, para. 76.

46 *A.B.* c. *Clercs de Saint-Viateur du Canada*, *supra*, note 35, para. 54; *Skarstedt* c. *Corporation Nortel Networks*, 2011 QCCA 767, para. 16; *Pellemans* c. *Lacroix*, *supra*, note 14, para. 52.

[69] Judges should resist the temptation to always seek to reduce class counsel fees as it could risk provoking a practice among lawyers of asking for more, knowing that the agreed amount will be reduced by the court.[47]

[70] 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. The court also must hear representations of the FAAC.[48]

### 2.1.1 Contingency Agreements, Percentages and the Use of Multipliers

[71] While there are some exceptions, contingency fee agreements are generally valid in Quebec[49]. In class actions, they are not only allowed, but common and should be encouraged.[50]

[72] 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 despite the risk that the expenses incurred as well as the time spent may never be recovered. Without contingency agreements, many class actions would never see the light of day.[51]

[73] In 2011, after an exhaustive review of the case law, Justice Prévost concluded that the reasonable standard was somewhere between 20% and 25%.[52] This range remains relevant today although some have since granted higher[53] or lower[54] percentages. With

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47 *A.B.* c. *Clercs de Saint-Viateur du Canada*, *supra*, note 35, para. 56.

48 Art. 593 C.C.P.

49 *Montgrain* c. *Banque Nationale du Canada*, 2006 QCCA 557, para. 53.

50 *A.B.* c. *Clercs de Saint-Viateur du Canada*, *supra*, note 35, para. 57; *Majestic Asset Management* c. *Banque Toronto-Dominion*, 2024 QCCS 225, paras. 109 to 112; *Pellemans* c. *Lacroix*, *supra*, note 14, para. 49; *Bouchard* c. *Abitibi Consolidated*, *supra*, note 9, para. 52.

51 *Schneider (Succession de Schneider)* c. *Centre d'hébergement et de soins de longue durée Herron inc.*, 2021 QCCS 1808, paras. 57 to 59; *Allen* c. *Centre intégré universitaire de santé et de services sociaux de la Capitale-Nationale*, *supra*, note 9, 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.

52 *Abihsira* c. *Stubhub inc.*, *supra*, note 7, para. 70; *Marcil* c. *Commission scolaire de la Jonquière*, 2018 QCCS 3836, para. 80 (Application to set aside judgment dismissed, 2020 QCCS 412).

53 *Bouchard* c. *Audi Canada inc.*, 2021 QCCS 10, paras. 38 and 43 (33%, but using a multiplier of 0.9); *Girard* c. *Vidéotron*, 2019 QCCS 2412, para. 33 (30%) (Motion for permission to appeal dismissed, 2019 QCCA 1531).

54 *Dorval* c. *Industrielle Alliance, assurances et services financiers inc.*, 2021 QCCS 139, para. 23 (12%); *Abihsira* c. *Stubhub inc.*, *supra*, note 7, 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 9, para. 210 (18.2%); *Marcil* c. *Commission scolaire de la Jonquière*, *supra*, note 52, para. 122 (12%) (Application for retraction of

regard to higher percentages, although cases involving a significant risk could potentially justify them, one wonders what could explain a generalized inflation of the percentage, given that since 2011, the procedure at the authorization stage has been considerably simplified.

[74] The fact that a percentage is within or outside this range is not decisive. The analysis of the reasonableness of class counsel fees cannot be limited to verifying that the fee agreement provides for a percentage within a generally applied range.[55] Indeed, it is not the percentage that must be reasonable but the fees themselves.

[75] The reasonableness of class counsel fees must be established on the basis of each individual class action or settlement.[56] As Justice Perell wisely and poetically observed:

> [129] Like snowflakes, each of which is a unique crystal, class actions are a unique matrix of facts, law, circumstances, risks of many types, contingencies, personalities, and possibilities of proof. The determination of whether to approve a settlement depends on the facts and circumstances particular to that class action.[57]

[76] The same can be said with regard to the approval of class counsel fees.

[77] The reasonableness of the fees depends on several factors other than the percentage including: the overall value of the settlement, the actual benefit of the settlement to class members, the settlement take-up rate, the fact that part of the settlement fund will go the FAAC or charitable organizations as opposed to class members, whether the class action is a copycat of another filed previously in another jurisdiction, whether the class action resulted in a change of defendant's practices, the actual time spent on the matter, etc.

[78] For example, where the amount of the settlement or judgment is very large or where the settlement occurs quickly,[58] 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.[59]

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judgment dismissed, 2020 QCCS 412); *Schachter* c. *Toyota Canada inc.*, 2014 QCCS 802, para. 113 (5%).

55 *A.B.* c. *Clercs de Saint-Viateur du Canada*, *supra*, note 35, para. 58; *Majestic Asset Management* c. *Banque Toronto-Dominion*, *supra*, note 50, para. 100; *Rahmani* c. *Groupe Adonis inc.*, 2021 QCCS 2616, paras. 60 and 61.

56 *A.B.* c. *Clercs de Saint-Viateur du Canada*, *supra*, note 35, paras. 51 and 57 quoting from *Option Consommateurs* c. *Banque Amex du Canada*, *supra*, note 6, para. 66; *Skarstedt* c. *Corporation Nortel Networks*, *supra*, note 46, para. 31.

57 *Bancroft-Snell* v. *Visa Canada Corporation*, 2018 ONSC 5166, para. 129.

58 See Justice Samson's comments in *Allen* c. *Centre intégré universitaire de santé et de services sociaux de la Capitale-Nationale*, *supra*, note 9, paras. 129 to 132.

59 *Chetrit* c. *Société en commandite Touram*, 2020 QCCS 51, para. 37.

[79] 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[60] 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.[61]

[80] 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[62], to cease causing damages, 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.

[81] Multi-jurisdictional class actions often result in out-of-court settlements. In such cases, a significant disparity in the value of professional services rendered by class counsel acting in various jurisdictions may exist. Typically, a law firm in one jurisdiction negotiates the bulk of the settlement, which forms the basis for the settlement of all class actions on the same subject matter in other jurisdictions. This can weigh heavily on the reasonableness of the amount claimed.[63]

[82] The reasonableness of the fees may also be considered in light of the actual time spent on the case. While courts have sometimes intervened when the application of a percentage results in a multiplier that is out of proportion to the norm (usually between 2 and 3),[64] the Court of Appeal has warned against a mechanical application of this method. As is the case with percentage ranges, the establishment of rigid floors or ceilings should be avoided. The assessment of the reasonableness of fees should proceed in a holistic fashion rather than being reduced to a simple mathematical formula.[65]

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60 *Allen* c. *Centre intégré universitaire de santé et de services sociaux de la Capitale-Nationale*, *supra*, note 9, paras. 129 to 132; *Option Consommateurs* c. *Banque Amex du Canada*, *supra*, note 41.

61 *A.B.* c. *Clercs de Saint-Viateur du Canada*, *supra*, note 35, para. 58.

62 *Bitton* c. *Amazon.com.ca ULC*, C.S., Montréal, 500-06-001195-227, February 23, 2024, j. Nollet, para. 18; *Nicolas* c. *Vivid Seats*, 2023 QCCS 4409, para. 32; *Holcman* c. *Restaurant Brands International Inc.*, 2022 QCCS 3428, para. 47; *Preisler-Banoon* c. *Airbnb Ireland*, 2020 QCCS 270, para. 33 (Closing judgment, 2021 QCCS 15).

63 *A.B.* c. *Clercs de Saint-Viateur du Canada*, *supra*, note 35, para. 66; *Pellemans* c. *Lacroix*, *supra*, note 14, paras. 60 to 63.

64 *Sony BMG Musique (Canada) inc.* c. *Guilbert*, 2009 QCCA 231 (multiplier of 2.5); *Abihsira* c. *Stubhub inc.*, *supra*, note 7, 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 9, 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 54 (multiplier of 2); *Sonego* 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).

65 *A.B.* c. *Clercs de Saint-Viateur du Canada*, *supra*, note 35, para. 62.

[83] The multiplier approach has also been subject to criticism for other reasons. For example, it has been said that it encourages lawyers to spend excessive hours engaging in duplicative and unjustified work, to inflate their normal billing rates or docketed hours and that it creates a disincentive for the early settlement of cases.[66] More importantly, time spent on a matter may not be reflective of the value of the work. As Justice Belobaba observed, it should not matter whether "the settlement was achieved as a result of one imaginative, brilliant hour rather than one thousand plodding hours".[67]

[84] These concerns are valid. Nonetheless, when used properly, the multiplier method may be a useful tool for measuring or controlling the reasonableness of fees.[68]

[85] 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 consider the hours spent on the case and to apply a multiplier to adjust the amount of fees to make it reasonable.[69]

[86] Finally, the amount to which the percentage is applied also deserves comment. Because the validity of contingency fee agreements is premised on the alignment of the interests of counsel and client, the fee paid to class counsel should be proportionate to the value of settlement funds actually put into the hands of class members rather than the amount paid by the defendant. Where a substantial amount of money does not directly benefit the members, such as where the costs of administering the settlement are very high or where part of the settlement provides for a payment to charitable organizations, it may be appropriate to reduce class counsel fees or to apply the agreed percentage only to the portion that actually benefits the members.[70] New amendments to the *Solicitors*

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66 *Ibid*, paras. 60 and 67; *F.* c. *Frères du Sacré-Coeur*, 2021 QCCS 3621, 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).

67 *Cannon* v. *Funds for Canada Foundation*, 2013 ONSC 7686, para. 5, quoted with approval in *F.* c. *Frères du Sacré-Coeur*, *supra*, note 66, para. 166.

68 *A.B.* c. *Clercs de Saint-Viateur du Canada*, *supra*, note 35, para. 59; *Option Consommateurs* c. *Banque Amex du Canada*, *supra*, note 35, para. 65; *Skarstedt* c. *Corporation Nortel Networks*, *supra*, note 46, para. 35; *Association de protection des épargnants et investisseurs du Québec (APEIQ)* c. *Corporation Nortel Networks*, *supra*, note 64, para. 151; Bruce JOHNSTON and Yves LAUZON, *Traité pratique de l'action collective*, Montréal, Éditions Yvon Blais, 2021, p. 493.

69 *A.B.* c. *Clercs de Saint-Viateur du Canada*, *supra*, note 35, para. 64.

70 *Bramante* c. *Restaurants McDonald du Canada limitée*, 2021 QCCS 955; Eric SIMARD and Stéphanie LAVALLÉE, « Actions collectives et protocoles d'indemnisation au Québec en matière de sévices sexuels et de préjudice corporel » in Barreau du Québec, Service de la formation continue, *Colloque national sur l'action collective : Développements récents au Québec, au Canada et aux États-Unis (2018)*, vol 441, Montréal, Yvon Blais, 2018, p. 406.

*Act*[71] in Ontario provide that a client's lawyer should not receive more money in a settlement than the client and that the percentage should not apply to disbursements.

[87] The same principle should apply where a judgment or settlement provides for an individual or collective recovery and several members fail to make a claim.

### 2.1.2 Payment Schedule

[88] Class action settlements often provide for the immediate payment of class counsel fees while members must go through a claims process that defers payment of their compensation.

[89] While it is important that, once the settlement is reached, class counsel no longer bear the financial risk of the class action, deferring payment of a portion of the class counsel fees ensures that class counsel remain engaged until the closing judgment. Indeed, the main purpose of the class action is to compensate its members, and a significant part of the work of class counsel occurs in the execution phase of the judgment or settlement. The role of class counsel is not merely to obtain a satisfactory legal result for the members, but to make sure that they receive the value of the judgment or settlement that is intended to compensate them.[72] Waiting to finalize the evaluation of the class counsel fee recognizes the solidarity that must be shown by class counsel when the former claim their fees while their clients have to wait to receive the spoils of a successful class action or settlement.[73]

[90] Thus, the criticism sometimes raised with regard to the practice of evaluating class counsel fees once final compensation of the class is determined appears unfounded. Contingency agreements presuppose that lawyers are not paid until their clients are. It is precisely this risk - that the clients won't receive anything - that justifies a high premium on the time spent on the matter. As such, the practice of splitting the payment of counsel fees should not be considered a postponement of a payment owed, rather it represents a justified acceleration of the payment to be received to take into consideration that a favourable result has been obtained and that class counsel should no longer be obliged to remain out of pocket to complete its mandate.

[91] Finally, and perhaps more importantly, deferring the final evaluation of class action fees may often be necessary to evaluate the criteria used to assess the reasonableness of the fees. In many cases, waiting until the closing judgment to pay a portion of class counsel fees allows the court to achieve more certainty on the actual amount that benefits the class members or the efforts of class counsel to enforce the settlement or judgment. For example, when the number of claimants who actually file a claim is low, this could be

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71 *Contingency Fee Agreements*, O Reg 563/20 adopted under the *Solicitors Act*, RSO 1990, c. S.15.

72 *Brière* c. *Rogers Communications*, (C.S.) Montréal, 500-06-000557-112, November 9, 2017, j. Nollet, paras. 45 and 48; *Abicidan* c. *Ikea Canada*, 2021 QCCS 3258, paras. 23, 65 and 66 (Closing Judgment, 2022 QCCS 80); *Option Consommateurs c. Infineon Tecnologie A.G.*, 2014 QCCS 4949, para. 133.

73 *Abihsira* c. *Stubhub inc.*, *supra*, note 7, para. 87.

indicative of the fact that the settlement was not interesting for class members or that the efforts to publicize the settlement were insufficient. These are important factors to consider in assessing the reasonableness of class counsel fees.

### 2.2 Discussion

[92] Class Counsel asks the Court to approve a Class Counsel Fee of $990,000 plus applicable taxes.

[93] This amount is in line with the fee agreement signed by Plaintiff which provides for a payment of 30% of all sums received ("*trente pourcent (30%) plus toutes les taxes applicables de la somme perçue (incluant les intérêts en relation avec la présente action collective*").[74]

[94] Class counsel asks that this 30% be applied to the total value of the Settlement Fund of $3,300,000 which includes disbursements, Settlement Administration Fees and potentially a remaining balance to be split between the FAAC and charitable organizations.

[95] Many of the factors discussed above favour approval of the fee.

[96] The class action raised important issues. Class Counsel incurred significant risk as the result was not guaranteed. Class Counsel is experienced. The fees were not contested by Class Members. This was not a copycat of a claim filed in another jurisdiction. The Class Action resulted in a change of practice.

[97] Other factors could justify a reduction.

[98] The percentage is much higher than the average. When taxes are considered, the percentage represents 34% of the amount paid by the Defendants. The percentage is applied to disbursements, settlement administration costs and potentially to amounts which will be paid to the FAAC or charitable organizations.

[99] Important factors cannot be assessed at this time.

[100] For example, we don't know how many of the 327,181 Class Members will file a claim. This means that it is not possible to determine what percentage of the Settlement Fund will go to the Class Members as opposed to the FAAC or charitable organizations. The take-up rate can also have an important effect on the sum each Class Member will obtain as a result of the Settlement Agreement. Depending on the number of claims, Class Members may receive between 30% to 100% of the amount they paid for Insurance.

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[74] Exhibit R-6.

[101] As Class Members must affirm that they did not understand they would be charged for Insurance before being reimbursed, the take-up rate may also shed light on the number of Class Members who were actually deceived by Defendants' practices.

[102] The FAAC has shared these concerns.

[103] All things considered, these are valid reasons to postpone the final evaluation of the Class Counsel Fees until the Claims Deadline has passed.

[104] Class Counsel has not provided any details of the time spent on the matter. It took the position that because the percentage of class Counsel Fees was *prima facie* reasonable, it was not necessary to do so. As discussed, it is not the reasonableness of the percentage that the legislator asked the court to assess but the reasonableness of the fees. The percentage is but a component of this assessment and, much like the actual time spent on the matter, it is not the most important one.

[105] Regardless, one would expect that the actual time spent was minimal.

[106] The Settlement Agreement was signed approximately one year after the Application to authorize was filed.

[107] Thus, a first payment of $500,000 plus disbursements and applicable taxes should be more than sufficient to ensure that Class Counsel is made whole.

[108] The reasonableness of the balance claimed of $490,000 can be assessed after the Claims Deadline when the Court benefits from further information.

## CONCLUSION

[109] The Settlement Agreement is Approved.

[110] The Court approves a preliminary payment of $500,000 towards Class Counsel Fees plus applicable taxes and disbursements. It postpones the final determination as to the reasonableness of Class Counsel Fees until the Claims Deadline.

| **POUR CES MOTIFS, LE TRIBUNAL** : | **FOR THESE REASONS, THE COURT TO:** |
|---|---|
| **[111] ACCUEILE** partiellement la *Demande d'approbation du règlement d'une action collective et des Honoraires des Avocats du Groupe*; | **GRANTS** the present *Application to Approve a Class Action Settlement and for Approval of Class Counsel Fees* in part; |
| **[112] ORDONNE** que les définitions apparaissant dans l'Entente de Règlement (pièce R-1) s'appliquent et soient | **ORDERS** that the definitions found in the Settlement Agreement (exhibit R-1) apply to and are incorporated into this judgment, and |

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| incorporées au présent jugement et en conséquence, en fassent partie intégrante, étant entendu que les définitions lient les parties à la transaction; | as a consequence shall form an integral part thereof, being understood that the definitions are binding on the parties to the Settlement Agreement; |
| **[113] APPROUVE** l'Entente de Règlement en tant que transaction au sens de l'article 590 du *Code de procédure civile* et **ORDONNE** aux Parties de s'y conformer; | **APPROVES** the Settlement Agreement as a transaction pursuant to article 590 of the *Code of Civil Procedure* and **ORDERS** the Parties to abide by it; |
| **[114] DÉCLARE** l'Entente de Règlement (y compris son préambule et ses Annexes) est juste, raisonnable et dans l'intérêt véritable des Membres du Groupe, constitue une transaction au sens de l'article 2631 du *Code civil du Québec*; | **DECLARES** that the Settlement Agreement (including its Recitals 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 *Civil Code of Quebec*; |
| **[115] ORDONNE** et **DÉCLARE** que le présent jugement, incluant l'Entente de Règlement de l'action collective, lie chaque Membre du Groupe sauf ceux qui se sont exclus avant la date butoir; | **ORDERS** and **DECLARES** that this judgment, including the Settlement Agreement, shall be binding on every Class Member; |
| **[116] DÉCLARE** que le paiement par les Défenderesses des montants détaillés dans l'Entente de Règlement sera versé en règlement intégral des réclamations quittancées contre les Personnes quittancées au sens attribué à ces termes dans l'Entente de Règlement; | **DECLARES** that the Defendants' payment of the Settlement Amount as detailed in the Settlement Agreement will be in full satisfaction of the released claims against the Released Persons as defined in the Settlement Agreement; |
| **[117] APPROUVE** le paiement d'une première tranche de 500 000 $ plus taxes à titre d'honoraires des avocats du groupe plus les déboursés de 2 037,10 $; | **APPROVES** a partial payment of $500,000 plus taxes as Class Counsel Fees plus disbursements in the amount of $2,037.10; |
| **[118] PERMET** aux Avocats de Groupe de présenter une demande pour le paiement d'une deuxième tranche d'Honoraires des avocats du groupe après la Date limite des réclamations et **REPORTE** l'évaluation de la raisonnabilité des Honoraires des avocats du groupe à la date de la présentation d'une telle demande; | **ALLOWS** Class Counsel to present an application to obtain a second payment of Class Counsel Fees after the Claims Deadline and **POSTPONES** the evaluation of the reasonableness of Class Counsel Fees to the date of presentation of such application; |

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| **[119] PREND ACTE** de l'engagement et de l'obligation des Avocats du Groupe de rembourser au Fonds d'aide aux actions collectives la somme de 14 037,10 $ dans les 30 jours de la date du présent jugement à intervenir; | **PRAYS ACT** of Class Counsel's undertaking and obligation to reimburse the *Fonds d'aide aux actions collectives* the sum of $14,037.10 within 30 days of the date of this judgment; |
| **[120] APPROUVE** le processus de distribution conformément à la partie X de l'Entente de Règlement et **ORDONNE** aux parties de s'y conformer; | **APPROVES** the distribution process pursuant to section X of the Settlement Agreement and **ORDERS** the parties to abide by it; |
| **[121] ORDONNE** aux parties de demander un jugement de clôture lorsque l'administration du règlement sera complétée; | **ORDERS** the parties to ask for a closing judgment once the administration of the Settlement is completed; |
| **[122] LE TOUT**, sans frais de justice. | **THE WHOLE**, without legal costs. |

Martin Sheehan

Signature numérique de Martin Sheehan
Date : 2024.03.26 08:28:36 -04'00'

MARTIN F. SHEEHAN, J.S.C.

Mtre Joey Zukran
Mtre Léa Bruyère
LPC AVOCATS
Counsel for the Plaintiff

Mtre Christopher Richter
Mtre Rosalie Jetté
TORYS LAW FIRM LLP
Counsel for the Defendants

Hearing date: March 12, 2024